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Supreme Court of the United States

MEAD JOHNSON & CO.,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Seventh Circuit err by holding that evidence of consumer perception is legally irrelevant to a claim that an advertisement is misleading under the Lanham Act, so long as the words used in the advertisement have an "objectively verifiable" meaning?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is wholly owned by Bristol-Myers Squibb Co., which in turn is a publicly held company.

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Mead Johnson & Company respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit panel, authored by Judge Easterbrook, is reported at 201 F.3d 883 (7th Cir. 2000) and reproduced in the Appendix hereto ("App.") App. C at 9a. The opinion of the panel modifying its earlier decision and denying petitioner's petition for rehearing (as well as respondent's cross-petition) is reported at 209 F.3d 1032 (7th Cir. 2000) and reproduced at App. A at 1a. The opinion of the United States District Court for the Southern District of Indiana is reported at 41 F. Supp. 2d 879 (S.D. Ind. 1999) and reproduced at App. D.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 5, 2000. (App. C at 9a.) A timely petition for rehearing was denied on April 12, 2000. (App. A at 1a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c). The jurisdiction of the Seventh Circuit was based on 28 U.S.C. § 1292(a)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition primarily concerns Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), which reads:

> (1) Any person who, on or in connection with any goods or services, or any container for goods,

> uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

It also implicates Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52. The relevant sections of both statutes are reproduced in their entirety at App. E.

STATEMENT OF THE CASE

A. Introduction

Advertising claims are actionable, in private suits under the Lanham Act or in Federal Trade Commission ("FTC") proceedings under the FTC Act, under two circumstances.[1] False advertising claims may be brought where ads are untrue on their face. Misleading claims are also actionable. A misleading claim is one that, although literally true, conveys to the consumer a message that is untrue.

For decades, the lower courts have held that advertisements are "misleading" if consumers understand a particular message from the ad, and that message is untrue. Survey evidence as to consumer understanding of the message conveyed thus has been critical in such litigation. The Seventh Circuit below, rejecting long-standing uniform precedent in its own and from each of the eight sister circuits to have considered the issue, held that such evidence is legally irrelevant.

It did so in two ways:

- *First*, it ruled that consumer perception is irrelevant in interpreting an advertising claim, if, in the court's view, the words of that claim are "objectively verifiable" in meaning. (App. C at 14a.) The court looked to "lexicographers" and "philologists" as the ultimate arbiters of the meaning of commercial

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1. Because Congress created two remedies for false advertising claims, the standards by which an advertising claim is judged under the Lanham Act and the FTC Act are congruent.

claims (even though those claims are directed to consumers) and expressly rejected the "first impressions of people on the street" (*i.e.*, the views of the consumers themselves). Moreover, ignoring one of the key provisions of the statute, the court suggested that "misleading" does not include "factual propositions that are susceptible of misunderstanding" even if large numbers of consumers in fact misunderstand. (App. C at 15a-16a.)

- *Second*, the court, without discussion, rejected the approach used by the FTC, the government agency entrusted with pursuing false and misleading advertising to protect consumers, in dealing with allegedly misleading advertising, including the same types of claims as the one at issue here. That agency, like prior courts in Lanham Act actions, has used as its yardstick how it believes *consumers* understand an advertising claim, regardless of whether the agency believes that the claim communicates the perceived message or whether the perceived message was intended by the advertiser. The Seventh Circuit decision invalidates that approach.

While other circuits not only accept but *prefer* consumer perceptions of the meaning of claims over other evidence, the Seventh Circuit now considers them *irrelevant* if a claim is literally true. This will establish a much higher hurdle in that circuit for challenges to all but the few claims that are literally false.

Congress has created two primary mechanisms to protect consumers from false or misleading advertising – Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and, more

recently, Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Because of the FTC's limited resources and consequent inability adequately to police advertising practices nationwide, Congress empowered competitors to take action to enjoin false or misleading ads by enacting the Lanham Act.

This Court has played an important role in abolishing the rule of *caveat emptor* in American commerce, through its review of actions by the FTC (*see, e.g., Federal Trade Comm'n v. Standard Educ. Soc'y*, 302 U.S. 112 (1937), *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)). It has not undertaken a similar review of private actions under the Lanham Act which have the same objective – to stop false or misleading advertising. The Seventh Circuit here has erected a gargantuan hurdle to the review of claims that are literally true but allegedly misleading by categorically rejecting as irrelevant the perceptions of the audience to whom the claims are targeted. The inevitable result of the Seventh Circuit's decision will be a return to the rule of *caveat emptor* when it comes to these sorts of claims and a torrent of forum-shopping by defendants threatened with a Lanham Act false advertising action or named in an FTC order, who will seek a declaratory judgment or other relief in the only circuit to have staked out such a novel position.

B. The Dispute Below

Advertising claims often assert superiority in recommendations or endorsements by those perceived to have special expertise. These types of claims are particularly common in health care. Doctor recommendations, whether real or perceived, are a crucial factor in consumers'

purchasing decisions for many health care products, including infant formula.

Foremost among the promotional claims made by respondent Abbott Laboratories ("Abbott") in marketing its Similac infant formula has been the claim that the formula is the "**1st CHOICE OF DOCTORS**." Until enjoined by the district court, this claim appeared prominently in a blue ribbon on the front of each Similac label and in both pictures and text of various advertising and promotional materials for Similac, directed both to mothers and to physicians.

Petitioner Mead Johnson & Company ("Mead Johnson") challenged the veracity of the Abbott claim. Mead Johnson contended that this claim communicated to consumers the message that all or most doctors preferred Similac and did so for reasons reflecting the professional judgment of doctors – messages that Mead Johnson believed to be false. The district court, after extensive briefing and a thorough preliminary injunction hearing, found that Mead Johnson had discharged its burden of preliminarily showing the claim to be misleading.[2]

1. *The District Court Decision Granting the Injunction*

The district court rejected Abbott's contention that the claim was "straightforward," not comparative in nature, and simply intended to convince mothers that they should have

2. The district court separately denied an injunction as to Mead Johnson's challenge of the same claim on another Abbott formula, Isomil, a soy-based variety. The court found that Mead Johnson preliminarily had failed to demonstrate a likelihood of success in showing that fewer than a majority of doctors preferred that formula over other soy-based formulas. (App. D at 23a.)

"trust and confidence in the brands." (App. D at 36a.) Instead, the court characterized the claim as "deeply — and almost ingeniously — ambiguous" (App. D at 26a) and ruled that it communicated two key messages to consumers:

> (1) "a majority of doctors choose Similac . . . over Enfamil . . ."; and
>
> (2) "the doctors' choices are the result of the exercise of the doctor's professional judgment about the quality of the products."

(App. D at 49a-50a.)

The district court based these conclusions on the entire claim, "1st Choice of Doctors," and on its assessment of what consumers perceive the claim to mean, as evidenced by a consumer survey conducted by Mead Johnson's expert, Dr. Ivan Ross. That survey was designed to elicit consumers' understanding of the meaning of the claim, including the number of doctors to whom the claim referred. (A copy of the survey questionnaire is included at App. F.)

The district court then looked to research among physicians to determine whether Similac was in fact the "1st Choice of Doctors," as that claim was interpreted by consumers, *i.e.*, the preference of most doctors for professional reasons. The court was presented with 24 separate sets of results from surveys of physicians dealing with milk-based formulas. Most (21) of the 24 surveys showed that fewer than a majority of doctors preferred Similac, in varying percentages and with relatively consistent ratios between Similac and Enfamil. (App. D at 67a-79a.) The remaining surveys were considered procedurally flawed by the court.

Because in the district court's view Abbott could adduce no reliable evidence that a majority of doctors preferred Similac based on physicians' "professional judgment" (App. D at 22a-23a), the court granted that portion of Mead Johnson's requested relief. Abbott appealed.

2. *The Court of Appeals' Ruling*

The Seventh Circuit, in an opinion by Judge Easterbrook, reversed, finding first that, because *more* doctors prefer Similac than its principal competitor, even if less than half, and because "first" is "ordinal," rather than "cardinal" (denoting only "rank" not magnitude), the meaning of "1st Choice of Doctors" is objectively verifiable and is not appropriately the subject of consumer perception research.[3]

The Seventh Circuit failed entirely, both in its initial decision and on rehearing, to address the *entire* claim — "1st Choice of Doctors" — and the lack of any express limitation on the term "doctors" used in the claim, choosing instead to focus simply on the words, "1st Choice." (App. C at 10a.) Most significantly, the court offered no basis for its line-drawing other than its own evaluation of what the term "first choice" must mean, without regard for how consumers may have understood either that term or the complete claim. Indeed, the court expressly stated that, because words such as "first" have "objectively verifiable" dictionary meanings, courts should not look to "people on the street" to evaluate what those words mean. (App. C at 14a-15a.)

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3. As noted above, the court of appeals misunderstood the district court's treatment of the physician surveys entered into evidence, stating incorrectly that "many" of the surveys showed a majority preference. (App. C at 10a.)

The Seventh Circuit also concluded that "misleading" does not include "factual propositions that are susceptible to misunderstanding," thereby suggesting that a literally true claim cannot be misleading unless the advertiser actually *intends* a false implication, even if consumers are *in fact* confused or misunderstand.[4] (App. C at 16a.) In addition to ignoring the unlikelihood of finding evidence of actual intent in most cases, this leaves consumers entirely unprotected against claims that *unintentionally* mislead or confuse.

REASONS FOR GRANTING THE WRIT

Congress created a federal law of unfair competition, the principal purpose of which was to protect consumers from false or misleading advertising and to supplement the powers of the Federal Trade Commission to reduce unfair or deceptive commercial practices, including false advertising.

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4. Elsewhere in its decision, the appellate court also expressed "doubt" concerning the district court's interpretation of the consumer survey's findings that formed the basis of that court's conclusion that there was such confusion. (App. C at 14a.) However, as already noted, the court of appeals rested its decision on the "legal error" committed by the district court in looking to the consumer perception survey in the first instance. (App. C at 17a-18a.) It is well-established that a district court's evaluation of a consumer survey, particularly when interpreted and contested by the parties' experts, is a finding of fact entitled to deference unless clearly erroneous. *E.g., Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rarer Pharm., Inc.*, 19 F.3d 125, 134, 136 (3d Cir. 1994); *cf. Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 13-14 (7th Cir. 1992) (applying clearly erroneous standard to review district court's interpretation of the message communicated by the claim). Thus, the appellate court's comments in this respect, in the event they are treated as more than mere *obiter dicta*, were premised on an improper standard of review and should be rejected.

In view of the rapid growth in nationwide commercial advertising, uniformity in the application of this law is extremely important. The Seventh Circuit interrupted twenty years of consistent Lanham Act jurisprudence by declaring consumers' perceptions of the meaning of an advertising claim legally irrelevant – a change in the law which runs counter to the express congressional purpose of protecting consumers and which conflicts with uniform decisions from every other circuit to have addressed the issue. If the decision is allowed to stand, the resulting inconsistency among the circuits will prompt forum shopping by advertisers and will undermine FTC actions to protect consumers, by providing a forum for advertisers to challenge FTC rulings in which the FTC's professed yardstick for evaluating a claim – the agency's view of how consumers will perceive it – has been declared legally irrelevant.

I. THE SEVENTH CIRCUIT'S DECISION VIOLATES THE INTENT OF THE LANHAM ACT BY RENDERING EVIDENCE OF CONSUMER PERCEPTION LEGALLY IRRELEVANT AND CREATES A CONFLICT AMONG THE CIRCUITS.

The Seventh Circuit's decision departs from the federal law of unfair competition by rejecting consumers' understanding of ad claims as legally irrelevant. This ruling directly contradicts the plain language of the Lanham Act and stands in stark contrast to the decisions of the Seventh Circuit and all eight other circuits to have considered the matter. This Court's intervention is necessary to avoid the consequences of inconsistencies among the circuits and to ensure that the Lanham Act is interpreted as Congress intended – with the perceptions of consumers at the very

least relevant to the law's prohibition of false and misleading ad claims.[5]

A. The Lanham Act Makes Consumer Perception Determinative of Liability.

The Lanham Act renders actionable both affirmative misrepresentation[6] and descriptions or representations of fact which cause confusion or mistake or which deceive.[7] It is not necessary that an advertiser intend to deceive. The focus of the law is on the effect of an advertisement on the persons to whom it is directed, regardless of the motivation of the advertiser.

The Seventh Circuit rejected these precepts. It reasoned erroneously that "never before has survey research been

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5. Most courts, in considering Lanham Act challenges, for convenience, label claims that are literally untrue, "false," and claims that are literally true or ambiguous but that imply a false message, "misleading." *See, e.g., BASF Corp. v. Old World Training Co., Inc.*, 41 F.3d 1081, 1089 (7th Cir. 1994). Both the appellate panel here and Mead Johnson follow this convention. Of course, as explained below, the term "misleading" consistently has been interpreted to include statements that engender consumer confusion regardless of whether they are intentionally misleading. *See, e.g., Coca-Cola Co. v. Tropicana Prod., Inc.*, 690 F.2d 312, 317 (2nd Cir. 1982).

6. *See* 15 U.S.C. § 1125(a)(1)(B) (addressing a description of fact "which . . . misrepresents the nature, characteristics, qualities, or geographic origin of [the advertiser's] . . . goods. . . .").

7. *See* 15 U.S.C. § 1125(a)(1)(A)) (making actionable a description of fact "which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the . . . approval of . . . [the advertiser's] or another person's goods . . . by another person. . . .").

used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held." (*See* App. C at 14a-15a.) The court ruled that it was wrong to replace the work of philologists and lexicographers "with the first impressions of people on the street . . ." because that would "present firms [advertisers] with unrealistic demands for verification." (*See* App. C at 15a.) It went on to reject an interpretation of Section 43(a)(1) that considered factual propositions that are susceptible to misunderstanding to be misleading, stating " 'Misleading' is not a synonym for 'misunderstood.' " (*See* App. C at 16a.)

The practical consequence of this interpretation is that in order to show that an "objectively verifiable" claim communicates an untrue implied message, a Lanham Act plaintiff in the Seventh Circuit must demonstrate that the untrue implication was actually intended by the advertiser. Consumer misunderstanding does not suffice to make a claim actionable. In addition to erecting a formidable new barrier to challenges of misleading claims, the ruling effectively precludes any action even against a claim that *actually* misleads, if communication of the untrue message was not intended.

Apparently, the court overlooked Section 43(a)(1)(A), which expressly makes actionable descriptions or representations of fact which are "likely to cause confusion, or to cause mistake, or to deceive as to the . . . approval of [goods] . . . by another person." 15 U.S.C. § 1125(a)(1)(A). The perception of consumers is not only relevant; it is crucial to a determination of whether an ad claim is actionable under this provision. Moreover, the law's reference to "confusion" and "mistake" make it clear that advertiser intent is

irrelevant.[8] Liability under the Lanham Act has long been understood to attach to unintentional deceptions. *E.g., Johnson & Johnson-Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992) (looking to "what message was actually conveyed to the viewing audience"). " '[T]here is no requirement that the falsification occur wilfully and with intent to deceive.' " *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 (3d Cir. 1990) (*quoting Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958)); *see also Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993) (*citing Coca-Cola*, 690 F.2d 312, *supra*, for the proposition that a message implicitly conveyed to consumers is actionable if it " 'mislead[s], *confus*[*es*] or deceiv[es]' " (emphasis added)).

At bottom, the Seventh Circuit's decision seems premised on a disdain for the supposedly easily confused consumer. (*See* App. A at 4a-6a.) Paying heed to consumer "misunderstanding" in the face of the objective meaning of the words used, in the court's view, would bar all but the most "meaningless puffery" and prevent the communication of "valuable information" to consumers. (App. A at 4a-6a.)[9] In effect, the court stated, many consumers always will be

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8. *Cf. Thompson Med. Co. v. Pfizer, Inc.*, 753 F.2d 208, 213 (2d Cir. 1985) ("ultimate inquiry [under section 43(a) of the Lanham Act] . . . is whether there exists a 'likelihood that an appreciable number of ordinarily prudent purchasers [will] be misled, *or indeed simply confused*, as to the source of the goods in question'" (quoting *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir. 1978) (emphasis added))).

9. At one level, Judge Easterbrook's opinion seems to imply that even those consumers who *are misled* by a claim may be better off for their confusion. (App. C at 16a) (arguing that if a court were

(Cont'd)

confused; hence, consumers' opinions should not be considered when determining whether a claim is misleading.[10] Although the Seventh Circuit here evidently believed it to be *bad policy* to make actionable "factual propositions that are susceptible to misunderstanding" (App. C at 16a), Congress did just that when it passed the Lanham Act. *See, e.g., Better Business Bureau of Metro. Houston v. Medical Dir., Inc.*, 681 F.2d 397, 405 (5th Cir. 1982) (requiring disclaimer on advertisement that court found to be "susceptible to misunderstanding"). The Seventh Circuit cannot do away with congressional intent.

(Cont'd)
to bar a claim of anti-cavity protection for toothpaste because it is misunderstood by most consumers to prevent most cavities, "the number of cavities [would] rise," presumably because many of the misled people no longer would use the toothpaste). Although, in the unlikely scenario the court proposes, that might well be the result, Congress, through the Lanham Act, has made the considered judgment that, on balance, misleading consumers through advertising is not a desired social goal.

10. The court of appeals' concern that reliance on consumer perception could result in requiring advertisers to substantiate unrealistic perceived claims reflects a fundamental misunderstanding of how district courts scrutinize evidence of consumer reaction to claims to accept only those that are based on well-conducted studies and where the number of consumers who perceive a claim as being made is "not insubstantial," a term that generally refers to at least 20 percent of consumers. *See, e.g., Rhone-Poulenc*, 19 F.3d at 133-34, n.14.

B. Until This Decision, Courts Uniformly And Overwhelmingly Have Relied On Evidence Of Actual Consumer Confusion, Regardless Of The Literal Meaning Of The Claim.

As the law has been applied by every other circuit to address the issue, including the Seventh Circuit in past decisions, a plaintiff can assert a cause of action under the Lanham Act in one of two distinct ways: either by contending that a claim is literally false or, where the claim is "literally true or ambiguous, by contending that it is 'misleading in context, as demonstrated by actual consumer confusion.' " *BASF Corp. v. Old World Training Co., Inc.*, 41 F.3d at 1089 (*quoting Abbott Labs.*, 971 F.2d at 13). Indeed, when a plaintiff alleges that a claim is misleading, it is *obligated* to demonstrate consumer confusion. *E.g., B. Sanfield Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971-72 (7th Cir. 1999). "Generally, before a court can determine the truth or falsity of an advertisement's [implied] message, it must first determine what message was actually conveyed to the viewing audience. Consumer surveys supply such information." *Johnson & Johnson-Merck*, 960 F.2d at 298; *see also, e.g., Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39-40 (D.D.C. 1985) ("In considering charges of false and deceptive advertising, 'the public's impression is the only true measure of deceptiveness.' " (quoting 1A L. Altman, *CALLMAN'S THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 5.04 at 5-32 (4th ed. 1981)). In determining whether a claim misleads consumers, the perceptions of those consumers to whom the claim is directed are not only relevant, but offer the "best indicator of the existence of a likelihood of

deception." *Better Business Bureau*, 681 F.2d at 403. Until now, no court has questioned this elementary principle.

As the Second Circuit has explained:

> When a merchandising statement or representation is literally or explicitly false, the court may grant relief without reference to the advertisement's impact on the buying public. When the challenged advertisement is implicitly rather than explicitly false, its tendency to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction.

Coca-Cola, 690 F.2d at 317 (citations omitted) (quoted with approval in *Castrol*, 987 F.2d at 943).

The Seventh Circuit panel turned this established Lanham Act analysis on its head by stating, as a matter of law, that it is the dictionary meanings of words, compiled by "philologists and others who . . . devote their lives to discovering usage and interpreting nuance," that are dispositive, regardless of whether the words are alleged to imply an untruth and irrespective of what mere consumers understand those words to communicate in the context in which the claim is made. (App. C at 14a-15a.) However, it is not a court's (or a philologist's) reaction to the language of a claim that is determinative under this law, as unanimously interpreted, but the reaction of consumers. *See, e.g., American Home Products v. Johnson & Johnson*, 577 F.2d 160, 165-166 (2nd Cir. 1978); *Johnson & Johnson-Merck*, 960 F.2d at 297-98.

For example, the Second Circuit in *Avis Rent A Car System v. The Hertz Corp.*, 782 F.2d 381, 382 (2d Cir. 1986), evaluated the claim that "**Hertz has more new cars than Avis has cars.**" (emphasis added.) Avis had challenged Hertz's claim in part on the basis that, contrary to the claim's plain meaning, Avis indeed owned more cars (new and old) than Hertz had new. Each word in the claim had an "objective" meaning defined in a dictionary. In fact, the district court endorsed Avis' literal reading of the claim and, therefore, found the claim to be false. *Id.* at 384. The appellate court, however, examined a " 'copy comprehension study' " designed " 'to obtain and evaluate consumer comprehension of ideas' contained in the advertisement" and concluded that rental car consumers interpreted Hertz's claim in the context of the ad as applying only to Avis cars *available for rent. Id.* at 384-85. Understood through the eyes of consumers seeking to rent a car, as measured in consumer research, over 6,000 of the Avis cars (which were owned by Avis but not available for rent) were excluded from the calculation, rendering Hertz's claim accurate and not misleading. *Id.* Nowhere did the claim in *Avis Rent A Car* expressly state that it was limited to cars "available for rent," and, in fact, the word "cars" standing alone does not carry that connotation. It was only *in the context of the advertised product and the advertising claim* that the implied message could be assessed, and then only through evaluation of the perceptions of car-renting consumers. It was on that basis that the appellate court reversed.

Similarly, the Eighth Circuit in *United Indus. Corp. v. The Clorox Co.*, examined an equally "objective" claim that a product "**[K]ills roaches in 24 hours.**" 140 F.3d 1175, 1178 (8th Cir. 1998) (emphasis added). There, too, the district court assessed only the claim's literal meaning and found it to be true based on tests showing that roaches that came into contact with the product died within 24 hours. *Id.* at 1181, 1183.

However, on appeal, Clorox contended that, in the context of the advertising at issue, the claim implied to actual consumers that the product would "completely control an infestation by killing all of the roaches in one's home within 24 hours, while its competitors will fail to do the same." *Id.* at 1183. The appellate court recognized that Clorox's "proposed construction" was "highly dependent upon context and inference" and rejected it because it was "unsupported at this point [the preliminary stage] by expert testimony, surveys, or consumer reaction evidence of any kind" – *not* because, in the court's own view, the claim could not be fairly read in the manner proposed. *Id.*[11]

The primacy of evidence of actual consumer confusion has been asserted in decisions by nine separate circuits, including the Seventh Circuit prior to this case:

- "[W]hen the statement is literally true or ambiguous, the plaintiff must prove that the statement is misleading in context by demonstrated actual consumer confusion." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999).[12]

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11. *See also, e.g., Forschner Group v. Arrow Trading Co.*, 30 F.3d 348, 355 (2d Cir. 1994) (enjoining use of "Swiss Army Knife," based on survey data showing consumer association of the phrase with a level of quality and certain manufacturer, notwithstanding that the words had an easily definable literal meaning); *Rhone-Poulenc*, 19 F.3d at 128 (examining consumer survey data to determine whether challenger discharged burden of showing that the claim "the strongest antacid there is" misleadingly implied superior pain relief).

12. *See also B. Sanfield*, 168 F.3d at 971-72; *BASF Corp.*, 41 F.3d at 1089; *Abbott Labs.*, 971 F.2d at 13; *Kraft, Inc. v. Federal Trade Comm'n*, 970 F.2d 311, 319-20 (7th Cir. 1992).

- "If Cottrell can establish by consumer surveys or other means that Birex's advertising is likely to confuse or actually confuses consumers then the effect of the false 'implication' of EPA approval that Cottrell now asserts could be as damaging for Lanham Act purposes as an express false claim of EPA approval." *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1256 (10th Cir. 1999).

- "Where statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception (i.e., evidence that individual consumers perceived the advertisement in a way that misled them about the plaintiff's product)." *American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999).

- "Where a commercial claim is not literally false but is misleading in context, proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical." *United Indus. Corp.*, 140 F.3d at 1182.

- "Even if an advertisement is not literally false, relief is available under Lanham Act § 43(a) if it can be shown that the advertisement has misled, confused, or deceived the consuming public . . . Reactions of the public are typically tested through the use of consumer surveys." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997) (citations omitted).

- "[W]here the advertisements are not literally false, plaintiff . . . must show how consumers actually do react. . . ." *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d Cir. 1990).

- "[I]f 'the language of the advertisement is not unambiguous,' then the trial judge may be 'compelled to examine consumer data to determine first the message conveyed.' . . . Thus, if the lower court confronts an advertisement involving 'literally true or grammatically correct' statements, the trial judge cannot make a finding of deceptiveness unless the parties provide 'evidence of substance' about what 'the person to whom the advertisement is addressed find[s] to be the message.' " *Brown & Williamson Tobacco Corp.*, 778 F.2d at 40-41 (citations omitted).

- "Actual consumer confusion may be the best [although not only] indicator of the existence of a likelihood of deception. . . ." *Better Business Bureau*, 681 F.2d at 403.

- "It is equally well established that the truth or falsity of the advertisement usually should be tested by the reactions of the public." *American Home Prods. Corp.*, 577 F.2d at 165.[13]

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13. *See also, e.g., Johnson & Johnson-Merck*, 960 F.2d at 297-98.

Thus, the Seventh Circuit's decision here is inconsistent with decisions of the Second, Third, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits, as well as with prior decisions in its own court. Until now, no decision has stood to the contrary.[14]

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14. The procedural posture of the Seventh Circuit's decision, reversal of a grant of preliminary relief, should not lead to denial of this petition. The Seventh Circuit decision was decided on an issue completely separate from the merits of the case and is final in all relevant respects. It was not predicated and did not turn in any way on an analysis or evaluation of the standards peculiar to the grant or denial of preliminary relief (*e.g.*, likelihood of success, imminent and irreparable harm). Moreover, it also did not turn on or involve a reversal of a finding of fact by the district court, which could also be construed as preliminary. *See, e.g., United States v. General Motors*, 323 U.S. 373, 377 (1945) (granting certiorari where the court "should review [the] ruling inasmuch as it is fundamental to the further conduct of the case"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (requiring that lower court decision "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment").

The Seventh Circuit, in its decision, announced a new rule of law that applies irrespective of whether a court is considering preliminary or permanent relief. As noted above, that rule sets the Seventh Circuit apart from all other circuits on the crucial question of the appropriate role of consumer perception in enforcing the laws intended to protect consumers from false or misleading advertising. Consequently, a grant of certiorari is warranted.

II. THE COURT'S REJECTION OF CONSUMER UNDERSTANDING TO SET THE STANDARD TO WHICH ADVERTISERS MUST BE HELD WILL ALSO IMPEDE THE FEDERAL TRADE COMMISSION IN PROHIBITING FALSE ADVERTISING.

As noted above, the Lanham Act is but one mechanism for precluding false and misleading advertising. The other is action by the Federal Trade Commission pursuant to Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52.

The FTC, unlike private Lanham Act plaintiffs, is accorded a great deal of deference by the courts when it contends that an advertiser's claim is misleading. " '[A]s an administrative agency which deals continually with cases in the area, the [FTC] is often in a better position than are courts to determine when a practice is "deceptive," . . . This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.' " *Sandoz*, 902 F.2d at 228 (*quoting Colgate-Palmolive Co.*, 380 U.S. at 385); *see also Kraft*, 970 F.2d at 320 (noting that the FTC's "expertise in deceptive advertising cases . . . undoubtedly exceeds that of courts as a general matter"). The reason the courts have often deferred to the FTC for determining whether advertising is unfair or misleading is the FTC's " 'familiarity with the expectations and beliefs of the public, acquired by long experience.' " *Sandos*, 902 F.2d at 226 (*quoting American Home Prod. Corp. v. Federal Trade Comm'n*, 695 F.2d at 681, 686 (3d Cir. 1982) (amended 1983).)

Deference to the FTC to determine what ad claims are misleading is premised on the FTC's experience in

identifying *consumer perception* of the meaning of a claim. Although the burden of proof borne by the FTC differs from that borne by a Lanham Act plaintiff, the standard by which a claim ultimately is adjudged misleading is the same. *Compare Colgate-Palmolive*, 380 U.S. at 391-92 (not requiring FTC to conduct consumer surveys to "determine that [an advertising claim] . . . had a tendency to mislead") *with Sandoz*, 902 F.2d at 228 (Lanham Act decision but quoting this Court's language just noted) and *Brown & Williamson*, 778 F.2d at 40 (FTC Act case, but looking to "Lanham Act cases for guidance as to evidentiary requirements to establish 'tendency to deceive' "). In both instances, the relevant inquiry is what consumers understand the claim to mean – indeed, the basis for the FTC's ability to dispense with a consumer survey is its greater expertise in making that determination. *E.g., Brown & Williamson*, 778 F.2d at 41.[15]

The FTC has applied this very principle in addressing claims very similar to that at issue here. In circumstances almost identical to the plurality doctor preference claim of this case, the Commission has required that advertising claims of doctor preference be discontinued where in actuality most doctors have no preference, notwithstanding that more prefer the advertised product than any other. *See In the Matter of Gerber Prod. Co.*, 62 Fed. Reg. 13619 (1997) (consent order discontinuing claim that "4 out of 5 pediatricians who recommend baby food recommend Gerber," where 67 of 76 pediatricians who recommended

15. Note that, even so, there is a large difference between concluding that a claim is misleading *without evidence* of consumer perception to support that conclusion – as the FTC often does – and concluding that a claim is not misleading in the face of consumer evidence to the contrary – as the Seventh Circuit has done here.

specific brands of baby food recommended Gerber (4 out of 5), but where a much larger total number of pediatricians (560) were surveyed, most of whom did not recommend specific brands); *In the Matter of Standard Brands, Inc.*, 97 F.T.C. 233, 1981 FTC LEXIS 72 (Mar. 17, 1981) (discontinuing claim that "Twice as many doctors recommend Fleischmann's margarine as any other brand of margarine," as literally true but misleading in light of the fact that Fleischmann's own survey showed that most doctors (67.5%) did not recommend any specific brand of margarine).

Importantly, *in none of these decisions did the FTC make any finding or even allege that the claims were being made with an intent to deceive.* The FTC's sole focus was on what message the agency believed was conveyed to consumers by the claim. Had the FTC been constrained to apply the Seventh Circuit's newly minted analysis, neither of those cases would have been pursued.

This Court has approved the reasoning of the FTC in addressing advertising claims — reasoning identical to that of the district court here. In *Colgate-Palmolive*, 380 U.S. 374, *supra*, this Court noted with approval FTC cases in which false claims of product approval by a respected source were considered deceptive. "It is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected source." *Id.*, 380 U.S. at 389. The deceptive nature of such claims of third-party approval was based upon the fact that "the seller has told the public that it could rely on something other than his word. . . ." *Id.* The FTC was able to make that determination because of its "familiarity with the expectations and beliefs of the public, acquired by long experience." *American Home*

Products, 695 F.2d at 686. *See also, Federal Trade Comm'n v. Standard Educ. Soc'y*, 302 U.S. 112 (1937).

The Seventh Circuit's decision in this case refutes this core principle under which the FTC itself has pursued advertisers. The court's underlying ruling that it is legal error to use consumer perceptions and expectations "to set the standard to which objectively verifiable claims must be held" is fundamentally wrong and is contrary to the FTC's longstanding practice, which in turn has been upheld by this Court.

The FTC Act allows advertisers required by the FTC to discontinue use of an advertising claim to seek review of that order in any circuit where the claim is used. 15 U.S.C. § 45(c). As a result, in the wake of this decision, an advertiser subject to an agency order directed against a nationwide advertising campaign would be foolish not to seek review of that order in the one circuit that has repudiated the FTC's interpretation of the standard to which advertising must be held.

CONCLUSION

Because the Seventh Circuit's decision creates a conflict among the circuits in an important area of law that demands uniformity, rejects as irrelevant consumers' understanding of advertising claims, which the Lanham Act requires be considered, and rejects a fundamental test for understanding advertising claims that has governed enforcement of consumer protection laws by the Federal Trade Commission, a writ of certiorari should be issued and the decision below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND DECIDED APRIL 12, 2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2215

MEAD JOHNSON & CO.,

Plaintiff-Appellee,

v.

ABBOTT LABORATORIES,

Defendant-Appellant.

On Petition for Rehearing

DECIDED April 12, 2000

Before BAUER, EASTERBROOK, and KANNE, *Circuit Judges.*

PER CURIAM. Mead Johnson has filed a petition for rehearing asking us to remand so that the district court may increase the amount of the injunction bond. A higher bond would produce a higher potential award of damages for wrongful injunction, because we have already held that the district court should not have awarded preliminary injunctive relief. According to Mead Johnson, *Coyne-Delany Co. v.*

Capital Development Board, 717 F.2d 385, 394 (7th Cir. 1983), holds that it is possible to increase the injunction bond even after the injunction has been reversed.

Coyne-Delany does not hold any such thing. None of the parties to the case requested such a step. What the panel in *Coyne-Delany* remarked is that a litigant aggrieved by an insufficient injunction bond may ask the court of appeals to increase it. An increase could be beneficial to the enjoined party if (a) the court of appeals affirms the preliminary injunction, but a possibility remains that permanent relief will be denied; or (b) the preliminary injunction is vacated for legal error, but the district court remains free to afford new injunctive relief, the situation in *International Game Technology v. WMS Gaming Inc.*, 1999 U.S. App. LEXIS 22971 (Fed. Cir. Sept. 3, 1999); or (c) the increase precedes reversal of the preliminary injunction, and thus affords the enjoined party additional damages for harm suffered during the period between the increase of the bond and the end of injunctive relief. Nothing in *Coyne-Delany* suggests that an injunction bond may be increased after the preliminary injunction has already been reversed and will not be replaced by another.

A bond is a condition to preliminary injunctive relief. *Coyne-Delany* holds, among other things, that, if the injunction is reversed, compensation for harm caused by the injunction cannot exceed the amount of the bond. 717 F.2d at 393-94. That conclusion would be vitiated if the district judge could increase the bond after the injunction had been set aside, for then the bond would not cabin the damages. We explained in *Coyne-Delany* that the bond requirement is

an exception to the norm in American litigation that the parties bear their own costs and expenses. A prevailing party may recover up to the amount of the bond; beyond that, there is no basis for cost-shifting. To permit changes in the bond after an injunction's reversal would be to overturn the rule in fact, if not in name.

What is more, posting a bond is voluntary. "[I]f the plaintiff's damages [for persuading the court to issue a wrongful injunction] are limited to the amount of the bond, at least he knows just what his exposure is when the bond is set by the district court. It is not unlimited. If the bond is too high he can drop the suit." 717 F.2d at 394. If the bond can be increased after reversal, the plaintiff lacks the option to drop the suit in order to limit its exposure. Anyway, what would a post-reversal bond secure? If the plaintiff is entitled to balk and walk away, as *Coyne-Delany* says (and Fed. R. Civ. P. 65(c) contemplates), then an order to increase the bond would be ineffectual. An injunction bond is a condition of a preliminary injunction. Once the injunction has been reversed, the bond no longer serves a function other than securing payment of the prevailing party's damages. As we held in *Coyne-Delany*, these damages cannot exceed the amount of the bond that was in effect while the injunction lasted. Thus there is neither logical nor legal room for a post-reversal increase in an injunction bond. See *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 664 n.13 (7th Cir. 1995).

Abbott Laboratories also has filed a petition for rehearing. In response to that petition, the panel amends its opinion by replacing the paragraph at slip op. 7-8 (201 F.3d 883, 886-87) with this language:

Appendix A

Section 43(a)(1) forbids misleading as well as false claims, but interpreting "misleading" to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing truthful statements that will help many of them find superior products. A statement is misleading when, although literally true, it implies something that is false. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992). "Misleading" is not a synonym for "misunderstood," and this record does not support a conclusion that Abbott's statements implied falsehoods about Similac. Reducing ads and packaging to meaningless puffery can't be the objective of the Lanham Act — though it is a logical (and likely) outcome of Mead Johnson's approach, given the normal level of confusion and misunderstanding reflected in consumer surveys. Asked at oral argument whether a seller of aspirin could label that drug as an anti-inflammatory useful for arthritis (a medically established property of aspirin) if a survey showed that consumers confused palliation of symptoms with a cure for the disease, counsel for Mead Johnson replied that the claim of anti-inflammatory properties would be misleading for the same reason "1st Choice of Doctors" is misleading. This consequence of Mead Johnson's view is so counterproductive that the basic position cannot be accepted. We are not comforted by Mead Johnson's assurance that a seller could overcome consumer misunderstanding and make

the claim about anti-inflammatory (or anticavity) benefits if it delivered additional details about the nature and extent of these effects. Requirements along the lines of a package insert with medical details are the province of regulations issued by the Food and Drug Administration, not of litigation under the Lanham Act. What is more, adding details could be so costly and burdensome that sellers might choose to omit all of the information. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992); cf. *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1218-19 (7th Cir. 1993) (en banc) (observing that compendious advice is not always more useful to consumers). Anyway, if consumers did not read (or understand) the medical details they would be none the wiser, and on Mead Johnson's view the claim should be enjoined anyway.

None of this calls into question the understanding, expressed by many decisions, that whether a claim is either "false" or "misleading" is an issue of fact rather than law. See *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d at 13-15; *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943-45 (3d Cir. 1993); *Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992). Our fundamental conclusion is that a producer cannot make a factual issue just by conducting surveys about how science is done (or, worse, about how surveys should be conducted).

Appendix A

> The sort of survey evidence Mead Johnson gathered would not support a conclusion by a reasonable person that Abbott's claim either was false or implied a falsehood.

All members of the panel have voted to deny Mead Johnson's petition for rehearing. No judge has called for a vote on Abbott Laboratories' petition for rehearing en banc, which is denied, as is Abbott's petition for rehearing.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED APRIL 13, 2000

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 13, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 99-2215

MEAD JOHNSON & COMPANY,

Plaintiff-Appellee,

v.

ABBOTT LABORATORIES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

No. EV 98-131-C H/H

Appendix B

David F. Hamilton,
Judge.

ORDER

The slip opinion issued in the above-entitled cause on April 12, 2000, is amended as follows:

Page 1, line 1: Replace "Mead Johnson" with "Abbott Laboratories." Line 7, replace "Mead Johnson" with "Abbott".

Page 3, line 1 of new paragraph: Replace "Abbott Laboratories" with "Mead Johnson".

Page 5, replace the final paragraph with this language:

> All members of the panel have voted to deny Abbott's petition for rehearing. No judge has called for a vote on Mead Johnson's petition for rehearing en banc, which is denied, as is its petition for rehearing.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JANUARY 5, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 99-2215

MEAD JOHNSON & COMPANY,

Plaintiff-Appellee,

v.

ABBOTT LABORATORIES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. EV 98-131-C H/H — **David F. Hamilton**, *Judge.*

ARGUED NOVEMBER 9, 1999 — DECIDED JANUARY 5, 2000

Before BAUER, EASTERBROOK, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* "1st Choice of Doctors", in a blue ribbon on a product's packaging, conveys the message that more physicians prefer this product than any of its rivals. Does (must?) this phrase mean something more — for example, that a majority of all physicians prefer the product, or that the preference is strong or based on particular

grounds? The phrase appears on the packaging of Similac®, an infant formula made by the Ross Pediatrics division of Abbott Laboratories. More than a score of surveys show that pediatricians prefer Similac over Enfamil®, the second-place formula (made by Mead Johnson), with all other competitors far behind. Many of these surveys show that Similac attracts majority support; most show that two physicians prefer Similac for every one who chooses Enfamil. But the district court nonetheless held that "1st Choice of Doctors" violates §43(a)(1) of the Lanham Act, 15 U.S.C. §1125(a)(1), because it implies to consumers that a majority of physicians strongly prefer the product for strictly professional reasons. 41 F. Supp. 2d 879 (S.D. Ind. 1999). All of the surveys that show majority support are inadequate, the judge concluded, because they were designed to elicit either weak preferences or those based on grounds other than medical judgment about quality. Other surveys, designed to eliminate slight or non-medical preferences, show that Similac enjoys only plurality support among physicians. A regular 2-to-1 margin is not enough to permit Abbott to make the "1st Choice" claim, the court held, and issued a preliminary injunction. In politics this would be a landslide: Bill Clinton was the "1st Choice of Voters" at the 1992 and 1996 Presidential elections even though he received less than half of the popular vote (43% in 1992, 49% in 1996). But in marketing, according to the district court, a product must have majority support to be "first."

In English, "first" is ordinal. It denotes rank in a series. A runner who crosses the finish line ahead of all others is "first" even if the race is slow and ends in a photo finish. A TV series ranks first in its time slot if it has a larger audience

than any other series, even though there are so many networks, independent stations, and cable channels that no sitcom or drama attracts an absolute majority of viewers. A political candidate who receives more votes than the next-most-popular candidate finishes first, and for most offices a first-place finish is enough for election. Similac therefore is the "1st Choice of Doctors" according to ordinary usage. Perhaps a truthful claim of this kind could be misleading, and therefore actionable under §43(a)(1), if both absolute and relative levels of preference were small. Suppose 1.1% of pediatricians preferred Similac, 1% preferred Enfamil, 0.9% preferred some other formula, and 97% thought that all of the infant formulas were functionally identical. But absolute and relative preferences for Similac are substantial. Even if, like the district court, we throw out the surveys finding that a majority of medical professionals recommend Similac, the remaining surveys find that between 25% and 48% of those questioned rank Similac first, while Enfamil is the preference of between 10% and 40% of the respondents and never beats Similac. Surveys designed to elicit weaker preferences show that Similac receives between 51% and 64% support and Enfamil from 29% to 37%, so the roughly two-to-one ratio is not sensitive to methodology. Pediatricians may believe (as Abbott contends) that Similac is better tolerated by infants (*i.e.*, less likely to induce unpleasant side effects such as gas, fussiness, and loose stools) and therefore is better in practice, even though clinical tests do not find nutritional differences and experts agree that both products are of high quality. No matter. When the absolute level of preference for the leading product is high, and the difference in support from the medical profession substantial, it is all but impossible to call the claim of "first choice" misleading.

Appendix C

Unless the meaning of language is itself a question of fact, to be determined by survey evidence. And this is what the district court concluded after a three-day hearing on the request for interlocutory relief. Mead Johnson commissioned a survey, which was administered at malls in 16 cities across the United States to women who either had recently purchased infant formula or contemplated doing so during the next year. The district court's opinion describes this survey in detail, 41 F. Supp. 2d at 887-92, so we summarize. Interviewers asked two sequences of questions. The first was open-ended. After identifying "1st Choice of Doctors" as the subject, interviewers asked consumers "what you understand this part of the label to communicate to you." Most of the answers were treated as variations on "higher quality," if not medical superiority. The second sequence opened with the query: "in order for [the "1st Choice"] statement to be true, what percent of those doctors would have had to say that this product was their first choice?" More than 80% of the participants replied that at least a majority would have to prefer the product. The district court concluded from this survey that the claim "1st Choice of Doctors" conveyed to consumers the message that at least a majority of physicians prefer Similac on grounds of qualitative superiority. Then the judge scrutinized the surveys of physicians to see whether Abbott's claim, thus understood, had been substantiated. The judge found not, because surveys finding that a majority of surveyed physicians prefer Similac were not designed to ensure that the preference was based on Similac's superiority, while surveys that limited the grounds of preference did not show majority support for Similac.

Appendix C

Abbott insists that because it has been applying the phrase "1st Choice of Doctors" (or a variant) to Similac for a decade, Mead Johnson's suit is barred by laches. Yet because a product's promotion must be true and non-misleading at the time of sale, the packaging's history cannot preclude a challenge. Suppose that when Abbott adopted the phrase physicians preferred Similac, but by the time suit was filed a decade later Enfamil had gained the lead in surveys of the medical profession. Similac then could not be labeled as physicians' first choice. Laches would supply a defense if nothing had changed over time (and if the other elements of that defense, such as prejudice, obtained). *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191-94 (2d Cir. 1996). Moreover, long use of a phrase justifies placing on the challenger a burden to establish that something has changed, so that what was once true is now false (or at least misleading). The district court did not find that critical numbers have changed in the last decade, so perhaps Abbott has a sound laches defense, but we need not say given the weakness of Mead Johnson's position on the record assembled so far. If on remand Mead Johnson decides to press forward with more evidence in pursuit of permanent relief, then the district judge will have to decide whether it has demonstrated a change in the truthfulness of Abbott's promotion.

Everything in the district court's analysis depends on the survey of consumers about their understanding of the phrase "1st Choice of Doctors." It is a problematic exercise, for the survey assumes that "first" is a cardinal number — that is, a count such as "246" or "55" or a ratio of two such numbers, rather than a place in a series. Only if "first" is a

ratio of cardinal numbers does it make sense to ask whether its meaning is 90% or 51% or a plurality. Respondents in survey research are suggestible; the form of a question implies an answer, or at least the range of proper answers, and this survey ensured that the answers would be numbers rather than places in a series. Having told the respondents to treat "first" as cardinal, the survey was bound to produce a misleading if not meaningless answer. "First" does not mean 51%, or 90%, or any other ratio, so it is not surprising that the responses were all over the lot. The survey's opening set of questions is less troublesome, but it is hard to get from there to a conclusion that surveys of physicians must attempt to limit the grounds of choice. Many a medical choice depends on ease of use rather than therapeutic effect; think of the enduring debate between champions of oral versus injected polio vaccine. If consumers took away from "1st Choice of Doctors" the implication that Similac is a high-quality product, as the author of the survey concluded, then they were not deceived (this Mead Johnson concedes); we doubt that it is proper to draw more from this survey.

There is a deeper problem: the use of a survey in the first place. Surveys are accepted ways to probe for things such as confusion about the source of goods, for confusion depends on the effect of a phrase or trade dress on the consumer. E.g., *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 912 (7th Cir. 1996); *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club L.P.*, 34 F.3d 410, 415-16 (7th Cir. 1994). So far as we can tell, however, never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held. Dictionaries themselves are

a form of survey; lexicographers determine how words have been used in both scholarly and popular texts. But philologists and others who contribute to dictionaries devote their lives to discovering usage and interpreting nuance. It would be a bad idea to replace the work of these professionals with the first impressions of people on the street, especially because consumers' sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification.

Suppose a tube of toothpaste bears this phrase in large type: "SODIUM FLUORIDE ANTICAVITY TOOTHPASTE" immediately above a box with the words "**ADA Accepted**". These claims could be verified by showing that the American Dental Association had authorized the use of its name and that the dentifrice had "anticavity" effects. To a dentist, the word "anticavity" means that the toothpaste reduces the number of cavities compared with some benchmark (perhaps toothpaste without fluoride, perhaps no toothpaste at all) by a statistically significant amount. Perhaps a group of 1,000 persons using the toothpaste with fluoride for two years had 1,000 cavities, while a control group suffered 1,200 cavities. If the difference satisfies normal tests of significance — meaning that the difference is replicable, rather than the effect of chance — then the claim is true and properly may be made to distinguish this toothpaste from others that are less effective at controlling cavities. It is valuable information to consumers. Imagine, however, a survey administered to shoppers in the toothpaste aisles of drugstores. First the questioner asks consumers "what you understand 'ADA Accepted' to communicate to you." Many are likely to respond that this means that the toothpaste is the best on the

market, solves (or at least addresses) all dental problems, or some variation — even though the ADA's rules permit multiple products in the same classification to be "Accepted" if each is medically useful, and the phrase "ADA Accepted" may be applied to a toothpaste that does not have any therapeutic effect against gum disease. See American Dental Association Acceptance Program Guidelines for Fluoride-Containing Dentifrices (May 1998). Perhaps the survey would continue with a question about what "anticavity" means to the shoppers: does it prevent, say, 90% of all cavities?, a majority of cavities?, and so on. Suppose most of those surveyed thought that "anticavity" means that its use will cut cavities in half. Combining that survey result with the district court's approach to verification would mean that the product could not carry the words "anticavity" or "ADA Accepted" even though these representations help shoppers distinguish toothpaste according to effects that they value. Consumers can't be made better off by removing these words from the product, because then buyers who understand their significance will be deprived of information. The market share of the toothpastes that are most effective in reducing cavities will fall, and the number of cavities will rise.

Section 43(a)(1) forbids misleading as well as false claims, but interpreting "misleading" to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing truthful statements that will help many of them find superior products. A "misunderstood" statement is not the same as one designed to mislead. Reducing ads and packaging to meaningless puffery can't be the objective of the Lanham Act — though it is a logical (and likely) outcome of Mead

Johnson's approach, given the normal level of confusion and misunderstanding reflected in consumer surveys. Asked at oral argument whether a seller of aspirin could label that drug as an anti-inflammatory useful for arthritis (a medically established property of aspirin) if a survey showed that consumers confused palliation of symptoms with a cure for the disease, counsel for Mead Johnson replied that the claim of anti-inflammatory properties would be misleading for the same reason "1st Choice of Doctors" is misleading. This consequence of Mead Johnson's view is so counterproductive that the basic position cannot be accepted. We are not comforted by Mead Johnson's assurance that a seller could overcome consumer misunderstanding and make the claim about anti-inflammatory (or anticavity) benefits if it delivered additional details about the nature and extent of these effects. Requirements along the lines of a package insert with medical details are the province of regulations issued by the Food and Drug Administration, not of litigation under the Lanham Act. What is more, adding details could be so costly and burdensome that sellers might choose to omit all of the information. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992); cf. *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1218-19 (7th Cir. 1993) (en banc) (observing that compendious advice is not always more useful to consumers). Anyway, if consumers did not read (or understand) the medical details they would be none the wiser, and on Mead Johnson's view the claim should be enjoined anyway.

By using Mead Johnson's survey to define the meaning of the phrase "1st Choice of Doctors" and then insisting that verification meet the standards thus established, the district

court committed a legal error. That is reason enough to reverse the preliminary injunction, so we need not address most of the other subjects on which the parties have locked horns. But we cannot close without expressing concern about the level of the bond, which the district judge set at $1 million under Fed. R. Civ. P. 65(c):

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The district court calculated Abbott's "costs and damages" solely by reference to the costs of printing new labels and promotional literature. But this suit is not about out-of-pocket costs (which Abbott estimates at $5.8 million); Mead Johnson and Abbott care about the issue principally because it affects the sales of their products. Mead Johnson conceded in the district court that the loss of even 1% of market share as a result of the injunction would cost Abbott about $10 million. (Abbott's estimate is $16 million per point of market share.) The principal reason the district judge gave for ignoring this effect (and for disregarding most of the out-of-pocket costs) was that Abbott should have quantified its losses earlier, and the only earlier opportunity was at the preliminary injunction hearing. Nothing in the record suggests, however, that the district judge alerted Abbott to this requirement in advance of the hearing. A litigant naturally would suppose (in the absence of notice) that a hearing on a request for a

preliminary injunction will be devoted to the merits of that request, rather than to fixing the amount of bond. The judge also called Abbott's estimate "soft" — which it was, given the need to come up with some number quickly. That might have justified using Mead Johnson's smaller estimate; it did not justify ignoring a cost that was sure to be large, even if the total was hard to determine on short notice. We trust that in the future the district court will notify the parties of the ground rules and endeavor to set bonds at levels reflecting full consequences.

When setting the amount of security, district courts should err on the high side. If the district judge had set the bond at $50 million, as Abbott requested, this would not have *entitled* Abbott to that sum; Abbott still would have had to prove its loss, converting the "soft" numbers to hard ones. An error in setting the bond too high thus is not serious. (The fee for a solvent firm such as Mead Johnson or its parent Bristol-Myers Squibb Co. to post a bond, a standby letter of credit, or equivalent security is a very small fraction of the sum involved.) See generally Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 Harv. L. Rev. 828 (1986). Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770 n.14 (1983); *Russell v. Farley*, 105 U.S. 433, 437-38 (1882); *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385, 393-94 (7th Cir. 1983). Abbott now must swallow substantial losses as a result of the district court's decision.

Appendix C

Trademark suits, like much other commercial litigation, often are characterized by firms' desire to heap costs on their rivals, imposing marketplace losses out of proportion to the legal merits. That's why bonds must reflect full costs. Shifting back to the plaintiff the complete injury occasioned by the errors that sometimes occur when preliminary relief is issued after an abridged judicial inquiry will hold in check the incentive business rivals have to pursue relief that gives them a competitive edge even if, as in this case, they lose in the end.

REVERSED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION MODIFYING MARCH 18, 1999 OPINION RE PRELIMINARY INJUNCTION DATED APRIL 13, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CAUSE NO. EV 98-131-C H/H

MEAD JOHNSON & COMPANY,

Plaintiff,

v.

ABBOTT LABORATORIES,

Defendant.

ENTRY ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Introduction

Defendant Abbott Laboratories advertises its Similac line of infant formulas under the banner "1st Choice of Doctors." Abbott's chief competitor in the infant formula market is plaintiff Mead Johnson & Company. Mead Johnson contends that the "1st Choice of Doctors" claim is false and/or misleading and thus violates Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1). Mead Johnson contends

the claim is misleading because consumers interpret it to mean that most doctors believe Abbott's product is medically superior to Mead Johnson's product, when in fact most doctors do not have a preference between the two leading brands and there is no evidence that one product is medically superior to the other. Mead Johnson seeks a preliminary injunction to stop Abbott from continuing to advertise with the "1st Choice of Doctors" claim.

The court held an evidentiary hearing on November 23-25, 1998. Pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure, the court now states its findings of fact and conclusions of law.[1] As explained below, the court finds that Mead Johnson has shown a substantial likelihood of prevailing on its claim that "1st Choice of Doctors" misleads consumers with respect to Similac in two independent ways. The market research on doctors' views of the competing brands is not consistent with consumers' actual and reasonable interpretations of the "1st Choice of Doctors" claim in two ways. First, consumers reasonably interpret the claim to mean that a majority of doctors choose Abbott products over Mead Johnson products. A fair reading of the many doctor surveys in question shows that Abbott products consistently gain the support of only a plurality of doctors. Second, consumers reasonably interpret the "1st Choice of Doctors" claim to mean that doctors base their choices on professional judgments about the relative quality of the products. The surveys that Abbott offers in support of the

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1. The court's resolution of the motion for preliminary injunction was delayed for about six weeks as a result of a disqualification issue addressed in the court's entry of February 22, 1999.

claim were not designed to elicit a doctor's exercise of professional judgment as distinct from a "top of the head" product or advertising recall. Because the other equitable factors also weigh in favor of injunctive relief, the court grants Mead Johnson's motion for preliminary injunction and will enjoin continued misleading advertising using the "1st Choice of Doctors" claim for Abbott's Similac brand. The relief will not extend, however, to Abbott's soy-based brand Isomil, as to which Mead Johnson has not shown the claim is misleading.

The facts in the case are voluminous, including evidence of numerous market research surveys of doctors and consumers who buy infant formulas. The evidence may be more readily understood if the court first lays out the legal framework that applies to Mead Johnson's motion for a preliminary injunction under the Lanham Act claim.

I. *Preliminary Injunction Standard*

In another recent Lanham Act case involving these same parties, the Seventh Circuit set forth its definitive standard for deciding motions for preliminary injunctions:

> As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however,

> the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.
>
> The court, sitting as would a chancellor in equity, then "weighs" all four factors in deciding whether to grant the injunction, seeking at all times to "minimize the costs of being mistaken." We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side.

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992) (vacating denial of preliminary injunction where Abbott showed likelihood of succeeding on merits and court should have presumed irreparable harm from deceptive comparative advertising) (citations omitted).

II. *Likelihood of Success on the Merits*

Section 43(a) of the Lanham Act provides in relevant part:

> (1) Any person who, on or in connection with any goods or services, . . . uses in commerce . . .

> any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> * * *
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). This provision of the Lanham Act has become the principal legal vehicle for one competitor to challenge another's advertising as false, misleading, and/or deceptive.

The prohibitions of Section 43(a)(1)(B) apply "with equal force to (1) statements which are literally false and (2) statements which, while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion." *Abbott Laboratories*, 971 F.2d at 13 (collecting cases); accord, *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1089 (7th Cir. 1994); *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d Cir. 1990); *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d

Cir. 1986); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir. 1981).[2]

Mead Johnson has not tried to frame its case in terms of "literal falsity." As explained in detail below, the claim "1st Choice of Doctors" is deeply — and almost ingeniously — ambiguous. As a result, Mead Johnson must prove first what messages consumers actually receive when they are exposed to the "1st Choice of Doctors" claim. In the advertising business, these received messages are often called the "takeaway." Mead Johnson must prove next that the messages are false or misleading.

Mead Johnson contends that Abbott's "1st Choice of Doctors" claim is misleading because it conveys two false messages to consumers: first, that a substantial majority of doctors prefer Abbott's products over Mead Johnson's and other competitors' products, and second, that doctors prefer Abbott's products because they are medically superior for infants. Mead Johnson contends the first message is false because market surveys of physicians show consistently that fewer than half of physicians have a preference for Abbott's products over competitors' products, and that a significant proportion of physicians have no preference among the competing products. Mead Johnson contends the second message is false because the available medical evidence shows that both Abbott's and Mead Johnson's products provide excellent nutrition to infants, and neither has been shown to produce clinically better results than the other.

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2. In *Abbott Laboratories* the Seventh Circuit referred to Section 43(a)(2). A later amendment to Section 43 put the operative language into Section 43(a)(1)(B).

Appendix D

Abbott correctly concedes that its "1st Choice of Doctors" claim implies the existence of market research to support the claim. Abbott Br. at 17; see also *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 436 (4th Cir. 1997) (whether claim of superiority implies survey or tests results to support claim is a question of fact). The "1st Choice of Doctors" claim plainly implies the existence of supporting survey data. The parties have presented a large quantity of evidence, especially concerning doctors' views on competing infant formula products. In evaluating Mead Johnson's likelihood of success on the merits, the court addresses that evidence as follows: (1) the infant formula market and the parties' products; and (2) marketing of infant formulas, focusing especially on the role of doctors in the marketing. The court then turns to: (3) Abbott's use of the "1st Choice of Doctors" claim in its advertising; (4) the evidence of consumers' perceptions of the claim; and (5) the evidence of market research among physicians relevant to the claim.

1. *Infant Formulas: The Market and the Products*

Each year approximately 3.8 to 3.9 million babies are born in the United States. About 3.4 million of them will be fed significant amounts of infant formula in their first year of life. III Tr. 172. Plaintiff Mead Johnson and defendant Abbott manufacture and sell roughly 90 percent of all the infant formula sold in the United States. I Tr. 26. Total annual sales in the market are greater than $2 billion. See Ex. 506 at D04492; see also Ex. 14.

Defendant Abbott Laboratories operates its Ross Division, which manufactures and sells a family of infant

formula products. The flagship brand is Similac, which is sold in a version "with iron" and a version with "low iron." Abbott also sells Isomil, a soy-based formula used for infants who do not tolerate milk products, as well as other specialty infant formulas.

Plaintiff Mead Johnson manufactures a competing family of infant formulas. Its flagship brand is Enfamil, which it similarly sells in a version "with iron" and another with "low iron." Mead Johnson's family of products also includes a soy-based formula called ProSoBee, a lactose-free formula called Lactofree, and other specialty infant formulas.

All witnesses in this case agree that both parties' products are high quality and provide excellent nutrition for infants. No one contends that the formulas are quite as good as human milk, but the manufactured formulas generally produce excellent results in terms of growth and development of infants. See also III Tr. 172 (at age of four to five months, only 10 to 15 percent of infants in the United States are exclusively breast-fed).

There are some differences in the parties' products. As between the flagship brands — Similac and Enfamil — Abbott and Mead Johnson use different mixtures of whey and casein as their principal protein sources. They also use different combinations of fats. More recently, in 1997 both companies began adding so-called free nucleotides to the formulas, and they do so in different proportions.

Abbott's chief doctor, William C. MacLean, Jr., testified about some reasons he believes Abbott's Similac is better

than Mead Johnson's Enfamil. Two points are critical concerning that testimony. First, Abbott categorically denies making any explicit claim to medical superiority, as Dr. MacLean repeatedly acknowledged. Second, Abbott makes no claim to medical superiority because it could not support such a claim with scientific evidence. There is no scientific evidence showing a clinically significant difference between these products, whether in terms of long-term or short-term health, growth, and development of infants.

On the absence of evidence showing a clinically significant difference, the testimony of Dr. Samuel Fomon was highly credible. Dr. Fomon is a physician with great expertise in infant nutrition. He wrote the authoritative book in the field used by scientists from both companies. Although Dr. Fomon testified as an expert for Mead Johnson in this case, he operates independently of both companies and both companies have turned to him for research and advice. The court credits his evaluation of the medical research.

This is not to say that differences between the formulas might not eventually turn out to be medically significant. For marketers of each company, proof of such a difference would be professionally equivalent to the discovery of the Holy Grail or the coming of the Apocalypse, depending on which product turned out to be better. Well-financed research teams for both Abbott and Mead Johnson have been trying for years to prove that one product is clinically better than the other. Neither has succeeded to date.

Appendix D

2. *The Marketing of Infant Formulas and the Role of Doctors in Marketing*

The United States market for infant formulas has two distinct segments, the "WIC" and the "non-WIC" markets. The WIC program, an acronym for Women, Infants, and Children, is a program funded by the federal government to promote nutrition among pregnant and nursing women, infants, and young children by subsidizing the purchase of nutritious foods for those who cannot afford ample nutrition. See generally 42 U.S.C. § 1786. WIC contracts in most states are handled on a sole-source basis, with the source selected on the basis of sealed bids, so that price competition is critical in choosing among otherwise acceptable products. Mothers and infants in the WIC program do not have a choice about the brand of formula that is subsidized. Mead Johnson currently has an edge in the share of the WIC market. The WIC program includes nearly half the infants born in the United States. I Tr. 26; Ex. 14.

In the non-WIC market, where consumers are free to choose among the competing brands, Abbott has had the edge in recent years in terms of market share, but Mead Johnson has been gaining. The parties' market research has produced conflicting results as to which company currently has the lead in that market. The court need not and does not make a finding on that point. In the non-WIC market, both Abbott and Mead Johnson use highly sophisticated marketing and sales techniques, and appear to compete vigorously. Both have medical research programs aimed at developing improved products and gaining a competitive edge.

Appendix D

Both Abbott and Mead Johnson focus their marketing efforts in the non-WIC market on doctors and other health care professionals. Abbott and Mead Johnson also use direct advertising to consumers (expectant mothers and mothers of newborn infants), plus advertising and marketing efforts directed at major retailers to secure channels for retail distribution with prominent product placement.

Abbott and Mead Johnson agree that doctors have significant influence over their patients' brand selections of infant formula. See, *e.g.*, II Tr. 278-79 (Abbott's Gottenborg: more than half of mothers are influenced by doctor recommendations); Ex. 17 at A047702 (doctor recommendations have a powerful influence on brand choice); Ex. 43 (Abbott promotion to retailers stating that doctor's recommendation is strongest influence on brand choice); I Tr. 50-51 (Mead Johnson's McCabe: doctor recommendation is the strongest advertising message in the market and sells more product than any other message); III Tr. 85 (Abbott's market research expert Dr. McDonald: "no doubt that's one of the most powerful claims that can be made * * * it's a very powerful claim. And obviously it's used as often as manufacturers can legitimately substantiate it."). The infant formulas are treated like medical products, and especially first-time mothers may not be confident that they know enough to make a good decision for their babies. Both Mead Johnson and Abbott view new mothers as emotionally vulnerable, especially with the birth of their first children. See I Tr. 33 (Mead Johnson's McCabe: first time mothers "seek out someone with authority to help them make those choices"); Ex. 43 (Abbott promotion to retailers: "high emotional significance of purchasing infant formula

products"); III Tr. 85 (McDonald: doctor's ratification of brand choice relieves consumer of worrying about choice).

Both competitors direct major market research efforts to understand the interactions between doctor and new mother. Both competitors pursue major marketing and advertising programs to influence those interactions. The doctor's influence on brand selection is important both when the doctor makes an express recommendation (of one brand or more than one brand) and when the doctor gives her approval to the patient's selection, as when a patient asks her doctor: "Is it all right if I use [Brand A]?" and the doctor says yes. Also, Abbott and Mead Johnson strive mightily to have hospitals and doctors distribute free samples of their products to new mothers. The doctor or hospital staff may not perceive distribution of free samples as a recommendation, but market research shows that mothers perceive it as such. See, *e.g.*, I Tr. 29-30 (McCabe); see also Ex. 469 at B2328 (recommendations and samples from doctors and hospitals have significant influence on brand selection).

In the past, doctors often made specific brand recommendations to their patients. In recent years, however, fewer and fewer doctors have been recommending one particular brand with a high degree of frequency. Most doctors perceive both Abbott and Mead Johnson products as high quality and suitable for infants, which is consistent with the available medical evidence summarized above. Those doctors generally either make no brand recommendation or recommend two or more brands. Mead Johnson and Abbott agree that doctors have become less

willing to direct their patients to one specific brand of infant formula. See, *e.g.*, I Tr. 28 (Mead Johnson's McCabe); Ex. 73 at A016286 and A016290 (Abbott market research); Ex. 74 at A050734 (same). As doctors have become more passive in brand selection, mothers have become more active in the product choice, so both companies have increased their advertising aimed directly at new mothers. I Tr. 28-29 (McCabe).

3. *Abbott's Use of the "1st Choice of Doctors" Claim*

Abbott features the "1st Choice of Doctors" claim prominently in its advertising, marketing, and packaging. Abbott places a blue flag with the words "1st Choice of Doctors" on all its infant formula product labels. That specific phrasing first appeared late in 1995. Abbott had included similar claims, such as "First choice of more physicians," on earlier labels beginning in 1989. See Exs. 405 & 406. The uncontradicted testimony of Mead Johnson's McCabe shows that Abbott recently has been increasing the amount of money it spends to promote the "1st Choice of Doctors" claim. See I Tr. 55-56.

Mary Gottenborg is the group product director for Abbott's line of infant formulas and is responsible for the overall marketing of the products. She described Abbott's marketing program for infant formulas. She described the first step as developing a "brand vision," a long-term goal for the product brand. The next step is to develop a "brand positioning statement," which is a summary of what the marketer wants to communicate to consumers about the product. The brand positioning statement then helps the

marketer identify potential advertising claims for the product that might be included in advertising for the product. II Tr. 256-57.

Gottenborg testified that the brand positioning statement for Similac has three components. The first is that "we are the first choice formula of doctors." The second is that "we help babies grow and develop." The third is that "by feeding Similac, we want mothers to have trust and confidence in our product." II Tr. 260. All advertisements should be consistent with the brand positioning statement. *Id.* Because the "1st Choice of Doctors" claim reflects all three components of the brand positioning statement, Abbott has featured it prominently in advertising for Similac and the other Abbott infant formulas.

Exhibit 22 is a March 1998 report to Abbott on a test of consumer reactions to several informational advertising pamphlets on Similac. Among six pamphlets, the one stressing the "1st Choice of Doctors" claim scored highest in terms of consumers' likelihood of purchase. II Tr. 273; Ex. 22 at A022986. The report concluded: "Doctor recommendations and the 'science' behind the formula appeared to drive purchase interest for this concept, as well as the other concepts tested," and use of similar pieces emphasizing the claim was "highly recommended." Ex. 22 at A022983. The advertisement scored very high in terms of convincing consumers that Similac "is the formula doctors prefer." Ex. 22 at A022990.

That market research led to the development and use of Exhibit 39, Abbott's direct consumer advertising piece that

leads with the "1st Choice of Doctors" claim. III Tr. 13. The piece then links the "1st Choice of Doctors" claim directly to a mother's desire for "only the best for your baby," and then emphasizes that "doctors know the science of good nutrition." The message and linkage between doctor preference and superior quality are plain.

Abbott also uses the "1st Choice of Doctors" claim in advertising directed at doctors, hospitals, and retailers. See Exs. 38, 43; II Tr. 261, 269 (Gottenborg); I Tr. 52 (McCabe).

4. *Consumer Perception of the "1st Choice of Doctors" Claim*

Lanham Act cases charging false or misleading advertising turn on the messages conveyed by the advertising claims in question. Where the plaintiff contends a claim is misleading but not literally false, the plaintiff must prove what messages consumers actually receive from the advertising.

(a) *Abbott's Evidence on the Message Conveyed*

Abbott's group product director Mary Gottenborg testified that Abbott intends the advertising claim "1st Choice of Doctors" claim to communicate "trust and confidence in the brand." II Tr. 261. She explained that Abbott wants to convince mothers that they can have trust and confidence in the brand because its products are the "first choice of doctors." II Tr. 266. "Our intent on communication in this piece was the same as it is on our label; that is, it's the first choice of doctors and we want to convince mothers that they

can have trust and confidence in using our brand." *Id.* Gottenborg testified that Abbott viewed the claim as "straightforward," and that being the "first choice of doctors" implies "trust and confidence" — that is "the take-away that one should perceive from it." II Tr. 281. She later added that the "1st Choice of Doctors" claim "conveys a special sense of confidence." II Tr. 298.

The court does not agree that the meaning of the "1st Choice of Doctors" claim is straightforward or self-evident. For example, does the claim refer to all types of doctors in all types of practices, or to some particular types of practices? More to the point here, does "1st Choice" refer to nearly all doctors, a substantial majority of doctors, a bare majority of doctors, or perhaps only a bare plurality of doctors? How, if at all, does the claim take into account the possibility that many doctors have no "choice" or preference among the top brands? At a more fundamental level, what does the claim mean by "choice?" Does it refer to a doctor's exercise of her professional judgment on behalf of patients, or does it refer to a more superficial brand recognition or top-of-the-head impression about brands?

Abbott's assertion that it intends to communicate "trust and confidence" raises as many questions as it answers. Why should consumers perceive "trust and confidence" from the "1st Choice of Doctors" claim? Abbott agrees that the claim is one of the most powerful it could use in marketing infant formulas. III Tr. 85 (McDonald). Why should that be so? One possible answer is that consumers expect doctors to have used their professional judgment in making any "choices" among competing brands. As Dr. McDonald testified, the

claim "says to consumers that a professional who is knowledgeable has ratified it [the choice of brand] and, therefore, allows a consumer not to think anymore about it." *Id.* Also, unlike a blander, non-comparative claim such as "trusted by doctors" (see Ex. 417 — Enfamil advertisement for "the formula mothers and doctors have trusted for nearly 100 years"), Abbott's claim to be "1st Choice of Doctors" is an inherently comparative (actually, a superlative) claim. Abbott's assertion that it seeks to communicate trust and confidence simply overlooks the comparative or superlative nature of its claim. See III Tr. 85 (McDonald acknowledging that some consumers may interpret the claim as a claim to be "better").

Although Abbott acknowledges that its ubiquitous "1st Choice of Doctors" advertising claim is a powerful claim, Abbott itself has undertaken no consumer surveys to test the actual "takeaway" of the claim. That is, Abbott has not presented any direct evidence that the actual takeaway is the "trust and confidence" message Abbott says it intends to communicate.

(b) *Dr. Ross Survey of Consumers*

At the preliminary injunction stage, Mead Johnson was not required to come forward with "full-blown consumer surveys" to prove actual consumer confusion. See *Abbott Laboratories v. Mead Johnson*, 971 F.2d at 15 (upholding district court finding of likely actual consumer confusion at preliminary injunction stage even though Abbott had not conducted such surveys); accord, *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998). In this

case, however, Mead Johnson has conducted a systematic survey of consumers' actual "takeaway" from the "1st Choice of Doctors" claim. That survey was conducted by Dr. Ivan Ross, who was employed by Mead Johnson's attorneys to conduct such a study. It is the only systematic study of consumers' actual perceptions of Abbott's claim. The results, set forth in Exhibit 1, are central to this case.

Dr. Ross supervised a survey of consumers through face-to-face interviews at shopping malls in 16 cities across the United States. Participants were screened so as to be women between the ages of 18 and 44 who either had purchased infant formula in the last three months or intended to purchase infant formula within the next 12 months for one or more of their own children. Women in the WIC program were excluded from the survey because they ordinarily are permitted no meaningful brand choice. Dr. Ross used a face-to-face survey because the participants were asked to respond to a "visual stimulus," a sample package of Abbott's Similac with the blue flag stating "1st Choice of Doctors." Neither the interviewers nor the participants were told the purpose or the sponsor of the survey.

For the first question to each participant, the interviewer pointed to the blue flag on the label claiming "1st Choice of Doctors" and then asked: "Please tell me what you understand this part of the label to communicate to you." Ex. 1, Tab A at A-4. The interviewer recorded the response verbatim, then continued to probe: "Anything else that communicates to you?" The interviewer was instructed to probe, that is, to repeat the "anything else" question, until the response was "unproductive," meaning the respondent

said "no," or "nothing else." Some respondents were asked that question several times. If the respondent answered by essentially repeating or "playing back" the words "first choice," the interviewer was then instructed to ask "what do you mean by that?" or words to that effect. See II Tr. 204.

The second question was a further follow-up: "Although you may already have mentioned this, what do you understand the wording 'first choice' to communicate to you?" The interviewer was again instructed to probe until the response was "unproductive."

The third question asked: "And although you may already have mentioned this, if you have an opinion, what reason or reasons do you think this product was 'first choice of doctors'?" The interviewer was again instructed to probe for additional reasons until the response was "unproductive." The interviewer then asked "why do you say that?" and probed the response once with: "Any other reasons you say that?" Ex. 1, Tab A at A-5. The fourth question asked the participants about the types of doctors referred to in the "1st Choice of Doctors" claim.

The survey then probed a central problem posed by doctors' approaches to these competing brands — the fact that a substantial proportion of doctors have no significant preference between them. The fifth question asked: "Now, suppose that a survey of doctors had been conducted by the company which makes this product and that they were relying on the results of that survey to make the statement you see here ["1st Choice of Doctors"]. If you have an opinion, in order for this statement ["1st Choice of Doctors"] to be true,

what percent of those doctors would have had to say this product was their first choice?" Interviewers were instructed to probe once: "And why do you say that." Responses were recorded verbatim. See Ex. 1, Tab A at A-7.

The sixth question went a step farther. The interviewer handed the participant a card showing:

DISPLAY CARD FOR POSSIBLE SURVEY OF DOCTORS

QUESTION: What brand of infant formula, if any, is your first choice?

RESULTS:

50%	— Said they had no first choice
30%	— Said Similac was their first choice
20%	— Said another brand was their first choice
100%	— Total doctors surveyed

Ex. 1, Tab A at A-20. The interviewer then asked: "Suppose that in that possible survey, the doctors were asked, 'what brand of infant formula, if any, was your first choice?' And suppose that the results were that 50 percent of the doctors said they had no first choice, 30 percent said Similac was their first choice, and that 20 percent said their first choice

was another brand. If those were the results of the survey, would you say that this statement ["1st Choice of Doctors"] is accurate or would you say that this statement is not accurate, or don't you have an opinion about that one way or the other?" Ex. 1, Tab A at A-7.[3] Interviewers probed with "why do you say that?" *Id.*

Because several questions were open-ended and responses were recorded verbatim, Dr. Ross had to "code" the responses. Dr. Ross and an associate separately coded all responses and then compared their results as a means of quality control. The final results reflect the reconciled coding after Dr. Ross and his associate compared their results.

In response to the first question about what the claim "1st Choice of Doctors" communicated, 52.6 percent of respondents gave answers that Dr. Ross and his associate coded as a reflection of qualitative superiority: superior, better, best, etc. Ex. 1, Tables at T-3. Abbott's market research expert criticized this calculation because Dr. Ross included answers referring only to doctors' "preferences." The criticism was valid because a consumer perception of doctor "preference" does not necessarily show that the consumer perceived the preference in terms of a view of product quality. In response to the criticism, Dr. Ross did a new calculation showing that if the answers referring only to doctors' "preferences" are subtracted, as they properly should have been, the relevant figure is that 41.3 percent

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3. To avoid possible bias resulting from the order of the choices, the questions to half the participants posed "accurate" as the first option and half posed "not accurate" as the first option.

understood the claim as making some claim of superiority. See II Tr. at 200-02; Ex. 114, Table 9.[4]

In response to questions about doctors' reasons for choosing Similac, Dr. Ross found that 54.9 percent of

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4. Federal courts have not established a numerical benchmark for determining when a claim is misleading for purposes of the Lanham Act. Circuit courts have written in terms of deceiving "a substantial portion of the intended audience," *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 (3d Cir. 1990), and deceiving "a not insubstantial number of consumers." *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); see also *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) ("deceived a significant portion of the recipients"); *Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297-98 (2d Cir. 1992) (requiring plaintiff to demonstrate that "a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement"); cf. *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 19 F.3d 125, 133-34 (3d Cir. 1994) (tendency to deceive 7.5% of consumers was not sufficient to prove deception). District courts have found a tendency to deceive where surveys indicated that a substantial minority of consumers was likely to be misled. See, *e.g.*, *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1114 (D.N.J. 1987) (potential that between 22% and 57% of consumers will be misled is not insubstantial); *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F. Supp. 867, 876 (S.D.N.Y. 1980) (deception rate of between 23% and 33% sufficient to warrant preliminary injunctive relief); *McNeilab Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 527 (S.D.N.Y. 1980) (23% not insubstantial number of consumers). In this case, the tendency to deceive more than 40 percent of consumers is substantial.

participants responded in terms of the quality of the product and/or superiority to other products. Ex. 1, Tables at T-7. The Ross survey did not differentiate between claims of long-term medical superiority defined by clinically proven results, which is the standard Mead Johnson contends is relevant, and less dramatic claims of short-term convenience and tolerance effects. See II Tr. 198-99.

In response to the fifth question about how many doctors would need to have identified Similac as their "first choice" for the statement to be true, 84 percent of the respondents said it would have to be more than 50 percent of doctors. Ex. 1, Tables at T-1. Only 1.4 percent of respondents gave answers of less than 50 percent as supporting the claim. *Id.*

The sixth question introduced the hypothetical survey in which 50 percent of doctors had no preference, 30 percent preferred Similac, and 20 percent preferred another brand. That question therefore introduced to participants the problem posed by those doctors having no preference and the possibility of a plurality of doctors preferring Similac. In response to the sixth question, 64.8 percent of respondents said those results would make the "1st Choice of Doctors" statement not accurate, while 19.8 percent said the statement would be accurate, and 15.4 percent had no opinion. Ex. 1, Tables at T-9.

Dr. Ross concluded from the results of his study that more than 80 percent of the consumers understood the "1st Choice of Doctors" claim to convey that a majority of doctors choose or prefer Similac. Ex. 1 at 23. He also concluded that more than 40 percent understood the claim as making

some claim of product superiority. With respect to the issue of doctors' reasons for choosing or preferring Similac, more than half attributed doctors' reasons to the doctors' views of the quality or superiority of the product. More than 90 percent of those respondents who expressed any opinion about doctors' likely reasons for their choices thought that the doctors' opinions would be based on product quality or performance.

Abbott criticizes the Ross consumer survey on several major grounds. Abbott contends that the Ross survey used excessive probing, which can introduce biases into a study by forcing responses from a person who has no meaningful response to give. Second, Abbott criticizes the attempt to ask consumers to speculate about why doctors might choose Similac over other brands. Third, Abbott criticizes the attempt to have consumers quantify the proportion of doctors who would have to choose Similac for the "1st Choice of Doctors" claim to be true. The court is not persuaded by these criticisms.

First, probing was appropriate here because of the ambiguity of the "1st Choice of Doctors" claim. In market surveys probing can be a powerful tool, but it can also introduce biases and produce artificial responses from a participant who has run out of meaningful ideas on a subject. Compare *L & F Products v. Procter & Gamble Co.*, 845 F. Supp. 984, 996 (S.D.N.Y. 1994) (repeating questions "also serves the purpose of clarifying otherwise ambiguous first responses by probing the implications of previous answers"), *aff'd*, 45 F.3d 709 (2d Cir. 1995), with *American Home Products Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739,

748 (D.N.J. 1994) (excessive probing undermined credibility of survey evaluating arguably implicit messages); see also *Johnson & Johnson-Merck Consumer Pharmaceuticals*, 19 F.3d at 133-34 & n.13 (Dr. Susan McDonald defended survey using repeated probes against attack based on "excessive probing"). Mead Johnson has the burden of showing what consumers understand that claim to mean. A more directive approach would no doubt have been criticized as introducing other biases into the study. Repeated probing was a fair means of determining the "takeaway" from the claim.

Also, Abbott's criticism of the probing rings a little hollow. An advertiser is responsible for both explicit messages in advertising and implicit messages communicated to a reasonable proportion of the audience. Abbott itself has not undertaken any study of the message or "takeaway" that consumers draw from the "1st Choice of Doctors" claim. The National Advertising Division of the Better Business Bureau (the "NAD") provides an informal and voluntary forum for resolving disputes over advertising, and the parties here have cited its decisions as persuasive authority. The NAD has taken the approach that an advertiser is responsible for supporting "any reasonable interpretation of its claims in an advertisement." *Church & Dwight Co.*, NAD Case Reports 11/95 213, 215. The Advertising Research Foundation similarly emphasizes the need for determining consumers' perceptions (or "takeaway" in the jargon) from advertising claims. See II Tr. 55-56; Ex. 25. The same responsibility is the foundation of the court decisions recognizing that an advertiser may be found liable for the implied messages or claims in advertising if consumers understand those claims in ways that make them

misleading or deceptive. *E.g.*, *Abbott Laboratories*, 971 F.2d at 13; *Sandoz Pharmaceuticals v. Richardson-Vicks*, 902 F.2d at 228-29; *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d at 386; *Vidal Sassoon v. Bristol-Myers Co.*, 661 F.2d at 277. Abbott's criticism on this score might have more force if Abbott had offered some conflicting evidence tending to show consumers do not infer something about product quality from the "1st Choice of Doctors" claim. It has offered no such evidence.

Abbott's second criticism — that Dr. Ross invited consumers to speculate about why doctors might prefer Similac — is also unpersuasive. See III Tr. 86-87 (McDonald). Some doctors may have brand preferences for reasons that have nothing to do with product quality. Perhaps they prefer the service from one brand's sales representative, perhaps they like one company's support for medical research, or perhaps they have any of a variety of other reasons for their preferences. See, *e.g.*, Ex. 2 at Tab C-29 to C-34 (some verbatim responses from doctors about reasons for preferences); Ex. 456 at PAR00216 (good service and rapport with representative cited by doctors more often than other reasons for preferring Similac).

In the court's view, however, it is perfectly obvious to all the marketing and market research witnesses who testified that the reason the "1st Choice of Doctors" claim is so powerful is that many *consumers* assume that such preferences are based on doctors' professional judgments about product quality. The NAD similarly recognizes that professional recommendations of health-care products are powerful because consumers interpret them as based on

professional assessments of product quality. See *Denmat Corp.*, NAD Case Reports 7/96 156, 161 (dental hygienists' recommendation of toothpaste: where hygienists are presented as experts, their "evaluation and selection of a certain product is expected to be an expression and exercise of their expertise"); *Braun, Inc.*, NAD Case Reports 4/94 18, 20 ("When dental professionals are given competing products to use under the same circumstances and asked a limited question, *i.e.* which, if either, they prefer, it can be assumed that professional expertise has been exercised in the comparison and expression of preference (if any)."); see also *Church & Dwight Co.*, NAD Case Reports 11/95 213, 215 (advertisement linking product feature to dentists' recommendation did not support claim where survey of recommendations did not show that the feature was the reason for the recommendations). Dr. Ross's questions on the perceived reasons for doctors' choices were less an invitation to speculate than a means of confirming what is common wisdom among those in the business. The strength of that wisdom is confirmed by the fact that, among consumers who offered an opinion on the subject, more than 90 percent answered in terms of product quality or superiority. See Ex. 1 at 23 and T-8.

Abbott's third principal criticism of Dr. Ross's consumer survey is aimed at the questions about the proportion of doctors who would have to have preferred Similac to support the claim. Abbott argues the questions were "grossly unfair" because they ask lay people difficult problems about statistics and patterns of preferences. III Tr. 88 (McDonald). As Dr. McDonald observed, the consumers who were surveyed probably do not spend a lot of time thinking about "the base" and the difference between a majority and a plurality. *Id.*

Appendix D

The court would not hold Abbott to a standard of 90 percent preference simply because one-third or so of the respondents thought that is what "first choice" meant, at least initially, before they were asked about the hypothetical survey of doctors. See Ex. 1 at F-13 (total of 32.8% answered 90% or more). The critical difference between a majority and a plurality, however, is well-recognized in the advertising business. See, *e.g.*, Ex. 25. When that difference was introduced expressly in the survey, an overwhelming proportion of respondents believed the "1st Choice of Doctors" claim would not be accurate if it were supported by only a plurality. Ex. 1 at F-15 (64.8 % — not accurate; 19.8 % — accurate; 15.4 % — no opinion). The court agrees with that overwhelming majority.

(c) *Perception of Medical Superiority?*

The Ross survey of consumers shows persuasively that the actual takeaway, the actual message received by consumers, includes a perception that doctors prefer Abbott's products because doctors believe they are superior to Mead Johnson's products. That is a reasonable interpretation of the claim, and that is why the claim is so powerful. But Mead Johnson has tried to take the results of the Ross survey a step farther, beyond the consumer perception that doctors prefer Abbott products because they are superior or of higher quality. Mead Johnson argues that this perception by consumers means that "1st Choice of Doctors" amounts to a claim by Abbott that the Abbott products have been proven through scientific research to produce clinically better outcomes for the infants fed with those products. Mead Johnson has devoted a great deal of energy to proving that no such proof of clinical superiority exists.

Appendix D

The court is not persuaded by Mead Johnson's effort to transform the "1st Choice of Doctors" claim into an establishment claim for clinically proven superiority. First, Mead Johnson's argument on this point would effectively erase all distinctions between different kinds of advertising claims. Under Mead Johnson's approach, any advertising that effectively persuades consumers to buy a health care product (perhaps so long as it did not emphasize price) would be treated as implicitly communicating a claim of scientific proof of superiority.

Second, and more important here, Mead Johnson has not supported this argument with the evidence of consumers' actual perceptions of the Abbott claim. The Ross survey shows that consumers "takeaway" *general* perceptions of product superiority from the "1st Choice of Doctors" claim. It did not go so far as to show that consumers perceived the "1st Choice of Doctors" claim in terms of superiority as specifically as Mead Johnson has argued — long-term clinically proven medical superiority. A doctor may have a significant professional preference between competing products based on perceptions of quality that are not supported by sophisticated clinical trials testing long-term results.

* * *

Thus, the weight of the evidence presented thus far shows that the "1st Choice of Doctors" claim communicates two key messages to consumers: (1) a majority of doctors choose Similac or other Abbott brands over Enfamil and other competitors; and (2) the doctors' choices are the result of

the exercise of the doctors' professional judgment about the quality of the products. The court next takes up the question whether Mead Johnson has shown that those messages are not fairly supported by the evidence about doctors' choices or preferences among the competing brands.

5. *The Evidence on the Market Research Among Doctors*

The central facts affecting all the market research and advertising in dispute in this case are these: surveys of doctors (especially pediatricians) show consistently (a) that a substantial proportion of doctors do not have a professional preference between Mead Johnson's Enfamil brand and Abbott's Similac brand, but (b) that among doctors who do have a brand preference, more favor Abbott's Similac over Mead Johnson's Enfamil brand. The precise numbers vary from study to study. The different results arose from differences in survey questions and methodology, such as the strength of the "filter" question to screen out doctors who have no preference, how hard participants were pressed to express a preference for only one brand, and the extent to which the survey sought to evoke a thoughtful exercise of professional medical judgment as opposed to a doctor's quick, top-of-the-head recall of brands. Nevertheless, despite significant differences in the exact numbers from survey to survey, the overall pattern is consistent.

In challenging the validity of Abbott's claim to be "1st Choice of Doctors," Mead Johnson focuses on the lack of preference to argue that the claim is misleading. Abbott counters by focusing on the fact that, among doctors with a brand preference, Abbott products score higher than

competing products.[5] Based on the evidence of consumers' perceptions of the claim, the court reasons that the "1st Choice of Doctors" claim could legitimately be supported only by evidence that a majority, not a plurality, of doctors express a professional "choice" or "preference" for Abbott's products over competitors' products. To be fair and not deceptive or misleading, the base against which the majority is measured must include doctors who do not have a choice or preference for a single brand. See *Gillette Co. v. Norelco Consumer Products Co.*, 946 F. Supp. 115, 124-125 & n.7 (D. Mass. 1996) (in evaluating claim of superiority based on consumer test, responses favorable to competitor and "no preference" responses must be combined because all are responses contrary to claim of advertiser's superiority). The parties have presented evidence on numerous surveys of doctors, and the court must examine those surveys in detail.

(a) *Dr. Ross Survey of Physicians*

After conducting his survey of consumer perceptions of the "1st Choice of Doctors" claim, Dr. Ivan Ross also conducted a telephone survey of physicians concerning their preferences for infant formula brands. The Ross survey used

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5. In their internal strategy documents used to motivate sales personnel and to develop business plans, however, the parties' emphases are reversed. Abbott's documents focus on the high proportion of doctors who do not have significant brand preferences for Similac over Enfamil. See, *e.g.*, Ex. 17 at A047703 (sales training materials). Mead Johnson's documents focus on the plurality lead that Similac generally has over Enfamil among those doctors who express brand preferences. See, *e.g.*, Ex. 445; Ex. 451 at B1665; Ex. 453 at B1684.

a "strong" filter question: "First thinking only about two brands of nonspecialized milk-base infant formula with iron, Similac With Iron and Enfamil With Iron, do you or don't you have a preference between them?" Ex. 2, Tab A at 1. In this survey, 64 percent of the physicians said they had no preference between the two brands. Ex. 2, Tab E at Table 1. Those who said they did have a preference were asked: "Which brand do you prefer?" If the answer was inconclusive ("it depends"), the interviewer asked: "If you usually have a preference, which brand do you usually prefer?" Using the total number of participants as the base, including the 64 percent with no brand preference, 25 percent preferred Similac, and 10 percent preferred Enfamil. Ex. 2 at 2; Ex. 2, Tab E at Tables 1 & 2.

The doctors were then asked: "Now, thinking only about two brands of soy-based infant formula, Isomil and ProSoBee — do you or don't you have a preference between them?" Ex. 2, Tab A at 3. In response to that question, 57 percent said they had no preference, 25 percent preferred Abbott's Isomil, and 15 percent preferred Mead Johnson's ProSoBee. Ex. 2, Tab E at Tables 11 & 12.

Dr. Ross concluded from his survey that Abbott's claim to be "1st Choice of Doctors," as it is understood by consumers, is not supported by the views of doctors. Abbott criticizes Dr. Ross's physician survey on several grounds.

First, Abbott argues that Dr. Ross used too strong a "filter" question by asking first whether the doctor had a preference between the two leading brands, and only then asking which brand the doctor preferred. Abbott contends

that this strong filter was intended to increase the "no preference" category to support Mead Johnson's position. Abbott further contends that the strong filter has the undesirable effect, for market research purposes, of suppressing subtle or slight brand preferences that are nevertheless important.

The strong filter clearly had the effect of increasing the "no preference" category. In fact, the "no preference" group was larger in Dr. Ross's survey than in any of the other surveys introduced into evidence. Both sides agree that some filter must be used so that the respondent is told explicitly that a response of "no preference" or "no opinion" is perfectly acceptable.[6] If Dr. Ross's survey were the only evidence tending to show that Abbott can win only a plurality among doctors, and not a majority, Abbott's criticism on this point would be more powerful. The court does not base its decision today on the doubtful suggestion that *only* a "strong filter" question would be sufficient in a survey used to support the claim. As shown below, however, the great weight of doctor surveys that test doctors' professional views — not merely their casual brand familiarity — show that Abbott's Similac

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6. See, *e.g.*, *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F. Supp. 1513, 1549-50 (S.D. Tex. 1996) (presence of a "don't know" option in consumer survey lent additional validity to results), *aff'd as modified on other grounds*, 155 F.3d 526 (5th Cir. 1998); *L & F Products v. Procter & Gamble Co.*, 845 F. Supp. at 998 (court "greatly troubled" by survey's failure to provide "don't know" or "no opinion" option); *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700, 734 (D. Neb. 1992) (citing testimony of Dr. Ivan Ross on importance of providing a "don't know" option for consumer studies done for legal purposes).

cannot win a majority among doctors. In light of all this evidence, the court finds that Dr. Ross's use of the strong filter did not undermine the validity of his survey here.

Abbott's point about the strong filter suppressing subtle but important brand preferences goes to the heart of a critical issue here. Dr. McDonald testified for Abbott that it is often important for market researchers to probe deeply, to tease out even slight and perhaps irrational and/or unconscious brand preferences. For many purposes, that view is no doubt correct.

The issue here is different. The issue here concerns the measurement of doctors' brand preferences for the purpose of persuading consumers to follow the views of the authoritative experts. Consumers value a doctor's recommendation so highly because they believe it reflects an expert's professional evaluation of the product's quality. Consumers do not value information about doctors' preferences based on the doctors' relationships with one brand's sales representative or based on other factors not related to product quality. The possibility that the strong filter in Dr. Ross's survey suppressed some slight preferences not related to perceptions of product quality also does not undermine the value of the survey for purposes of this case.

Abbott sharply criticizes Dr. Ross for using the word "preference" in his questions instead of the phrase "first choice." Abbott contends that any test of an advertising claim should use language as close as possible to the language in the claim itself. Dr. Ross explained that he used the word "preference" because of the possibility that, as a result of

Abbott's extensive advertising with the phrase, the phrase "first choice" would trigger some responses that merely "played back" the advertising because of the association of the phrase with Abbott's product. II Tr. 135-37. Dr. McDonald disagreed, arguing that doctors are not so easily swayed by advertising slogans. III Tr. 68.

There is some validity to both Dr. Ross's and Dr. McDonald's views on this problem, and there is no perfect solution to it. Even if most doctors are not swayed by a mere advertising slogan, Abbott does use the "1st Choice of Doctors" slogan in advertising aimed at doctors, see Ex. 38, II Tr. 261, 269; I Tr. 52, presumably because it works. Also, in terms of consumer "takeaway," the differences between "first choice" and "preference" and "recommend" appear to be very slight. For example, in testing consumers' "takeaway" from a proposed advertisement emphasizing "1st Choice of Doctors," the results were reported to Abbott in terms that Similac is "the formula doctors *prefer*," Ex. 22 at A022990 (emphasis added), and that "Doctor recommendations" drove interest in the concept, *id.* at A022983. The court does not believe the use of the term "preference" in Dr. Ross's survey undermines its validity as *a test*, even if it is not *the one definitive test*, of Abbott's claim that Similac is "1st Choice of Doctors." Thus, the court is not persuaded by Abbott's criticisms of Dr. Ross's survey of doctors. The survey provides substantial support for Mead Johnson's contention that Abbott's ambiguous "1st Choice of Doctors" claim is misleading.

Appendix D

(b) *The Glickman Surveys*

To support its claim to be "1st Choice of Doctors," Abbott relies primarily on surveys conducted by Glickman Research Associates and Burke Marketing Research. Those surveys require close scrutiny.

Glickman carried out so-called "check studies" in 1995 and 1996. Interestingly, for each of these studies, Glickman reported: "The objective of this study is to provide justification for [*i.e.*, not to "test"] the brand claim with regard to physician first choice recommendation of both Similac . . . and Isomil. . . ." Ex. 54 at A044972 (1995 study); Ex. 61 at A045016 (1996 study). In these studies, Glickman mailed checks in the amount of $1.00 to thousands of pediatricians. On the back of each check was printed a three-question questionnaire. The pediatricians were instructed to complete the questionnaire when they endorsed the checks. By cashing the checks, the pediatricians returned the questionnaires to Glickman through banking channels.

With respect to milk-based formulas, the questionnaires on the back of the checks asked: "Which of the following routine infant formulas, if any, is your '*first choice*' for a MILK-based feeding? (Please check only one.)" The available answers in order were:

Bonamil
Carnation Good Start
Enfamil
Gerber Baby Formula
Similac
SMA
Other (Please Specify)
None, do not have a "first choice"

See Ex. 54 at A044978; Ex. 61 at A045025.

Glickman reported the following results to Abbott for the milk-based products:

	1995	1996
Similac	51%	52%
Enfamil	29%	34%
SMA	7%	3%
Carnation Good Start	1%	1%
Bonamil	—	—
Gerber Baby Formula	—	—
Other	—	1%
None, do not have a "1st Choice"	20%	17%

See Ex. 54 at A044974; Ex. 433 at A045019.[7]

For soy-based formulas, the questionnaires asked: "Which of the following specialty infant formulas, if any, is

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7. The responses in these columns add up to more than 100 percent because Glickman counted multiple responses as a "first choice" for each brand that was marked. See page 34, below.

your '*first choice*' for a SOY-based feeding? (Please check only one)." In the 1995 survey, the available choices were Abbott's Isomil, Nursoy, Gerber Soy, Soyalac, I-Soyalac, Other, and "None, do not have a '1st choice.' " The 1995 survey did not include Mead Johnson's ProSoBee brand, which is the principal competitor for Abbott's Isomil. See Ex. 54 at A044978. The 1996 survey of soy-based formulas included as available choices: Abbott's Isomil, Mead Johnson's ProSobee, Nursoy, Carnation Alsoy, Gerber Soy, Other, and "None, do not have a '1st Choice.' " Ex. 61 at A045025. Glickman reported the following results to Abbott for the soy-based products:

	1995	1996
Isomil	58%	56%
ProSoBee	13% (write-in)	29%
Nursoy	8%	3%
Soyalac	1%	(N/A)
Soyalac	2%	(N/A)
Carnation Alsoy	(N/A)	—
Gerber Soy	—	—
Other	—	1%
None	22%	18%

Ex. 54 at A044975; Ex. 61 at A045020. Because the 1995 questionnaire did not even include Mead Johnson's

ProSoBee brand as a listed choice, those results have no probative value here.

The Glickman studies used exactly the same phrase — "first choice" — that Abbott uses in its advertising and that was being tested for purposes of claims substantiation. Each of the four Glickman surveys reflected responses of between 1734 and 1859 pediatricians.

There are several problems with Abbott's reliance on the Glickman studies to support the "1st Choice of Doctors" claim. First, when a pediatrician marked more than one brand as his or her "first choice," Glickman counted that response as a "first choice" for each brand marked. That approach is obviously inconsistent with an attempt to identify a single "first choice," whatever that claim might mean. A doctor who marked more than one brand as "first choice" is essentially saying she does not have a single first choice. The effect of Glickman's approach was to inflate brand preferences and to reduce the "none" or "no first choice" category. When the results of the Glickman surveys are adjusted to treat the multiple responses as responses of "none," the results for milk-based feedings were as follows:

	1995	1996
Similac	44%	45%
Enfamil	22%	27%
None or multiple	27%	24%

See Ex. 76 at 5; II Tr. 71 (Ross). That is, after a fair adjustment for multiple responses, the majority for Similac

dropped down to a mere plurality. The results for the 1996 soy-based survey adjusted in the same appropriate way left Isomil with exactly 50 percent:

Isomil	50%
ProSoBee	23%
None or multiple	23%

Ex. 76 at 5; II Tr. 71 (Ross). Even after these adjustments are made, the Glickman surveys pose problems. For example, Glickman undertook no effort to determine whether the questionnaires were actually filled out by the pediatricians instead of by other personnel in their offices. See II Tr. 65 (Ross).

More fundamental is the disconnect between on one hand the almost casual character of the question asked and the manner of its asking — on the back of a check of nominal value — suggesting the question should be answered off the top of the doctor's head, and on the other hand the weight that patients/consumers give to the physicians' expressions of preference. Dr. Ross described the answer to the $1.00 check survey as a "throw away exercise." II Tr. 239. The court agrees. To illustrate the importance, consider how seriously a doctor would consider a patient's question: "Doctor, which brand do you recommend I feed my baby?" and how seriously the doctor would treat a question on the back of a $1.00 check that is part of a mass mailing.[8]

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8. Abbott cites *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 586-88 (S.D.N.Y. 1987), to argue that a claim of professional affinity or recommendation does not imply

(Cont'd)

The difference was underscored by Glickman's use of the phrase "first choice recommendation" to describe the claim in reporting the survey results, despite the fact that its studies did not attempt to ask about actual professional recommendations. See Ex. 54 at A044972; Ex. 61 at A045016. In contrast, many other surveys discussed below asked about recommendation practices and generated results showing much larger groups of doctors who did not have a preference between these competitors. Those surveys asked questions more closely in tune with consumers' actual perceptions of doctors' preferences and the value that consumers place upon those preferences.

(Cont'd)
product superiority. In that case, the manufacturer of Tylenol advertised that hospitals "trusted" its product and supplied it ten times as often as competing pain-relief products. A competitor challenged that claim as deceptive on the theory that it implied product superiority, but the district court rejected the challenge. The court rejected it, however, on the basis that it reflected hospitals' actual practices in providing care to patients: "Hospitals surely wouldn't dispense an analgesic that is ineffective or unsafe, no matter how cheaply they can buy it. At worst, the statement is a half-truth, in that it omits to mention that hospitals choose Tylenol for the additional reason that it costs less than competitive analgesics. The Court finds that this omission does not make the 'hospitals trust' commercials unfair. There is nothing to prevent AHP from matching McNeil's prices to hospitals." 654 F. Supp. at 586. Where Abbott relies on surveys that probe doctors' actual professional practices, like some discussed below, the reasoning of *American Home Products* is applicable. It does not apply, however, to a $1.00 "check-rec" survey that made no effort to ask doctors about their actual practices as professionals.

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There are still other problems with the Glickman surveys as support for the "1st Choice of Doctors" claim. The Glickman surveys use the phrase "first choice" that has been the subject of extensive advertising and promotion by Abbott. In a debate that echoes Dr. McDonald's criticism of Dr. Ross's survey for using the term "preference" instead of "first choice," Dr. Ross criticized the Glickman surveys because the use of the identical "first choice" phrase created a risk that the responses would reflect exposure to the phrase in the previous advertising rather than an actual "choice" by the doctor. II Tr. 62-63. Dr. McDonald's rebuttal, that doctors are not so easily swayed by advertising, has some apparent validity, but it is not consistent with Abbott's actual commercial behavior in the marketplace. As discussed above, Abbott makes a point of using its "1st Choice of Doctors" slogan in advertising directed at doctors, II Tr. 269, presumably because it expects that phrase to encourage other doctors to go along with the professional crowd. Also, there is no perfect solution to the phrasing problem. Influence on even a small proportion of doctors, however, would have a significant effect on the validity of the Glickman surveys as support for Abbott's "1st Choice of Doctors" claim.

The parties focused much of their attention on whether the Glickman surveys should have used a stronger "filter" question to determine whether a responding physician actually had any preference between formula brands. Dr. Ross used the strong filter question: "First thinking only about two brands of non-specialized milk-based infant formula with iron — Similac With Iron and Enfamil With Iron — do you or don't you have a preference between them?" Ex. 2, Tab A at 1. That strong filter produced a

response of "no preference" from 64 percent of the doctors responding. Ex. 2, Tab E at Table 1. The Glickman surveys used instead what Dr. McDonald called a "quasi-filter," III Tr. 57-58, by including the phrase "if any" in the question asking about "first choice," and by including a "none" line among the available choices. The result of this weaker filter was a much lower rate of "no preferences."

Abbott and Dr. McDonald point out that market researchers often try to tease out the slightest, most subtle preferences among competing brands. III Tr. 54. Even very slight, perhaps unconscious, preferences may affect buying behavior of consumers. III Tr. 54-55. As Abbott points out, the revenue from a sale is the same whether the shopper's preference is slight or strong. Thus, it may be interesting, even vital, for Abbott and Mead Johnson to know about doctors' slight preferences for their brands, so that doctors responding to surveys should be pushed hard to express a single preference.

That valid point about market research, however, misses the point in question here, which depends on *consumer reaction* to advertising claims about doctors' choices, preferences, or recommendations. If consumers will reasonably interpret such an advertising claim as an expression of a doctor's expert professional judgment, the support for the claim should make at least some reasonable effort to determine how that doctor actually exercises his or her professional expertise. A question on the back of a $1.00 check simply does not do that, even if a fair calculation of the results had produced a majority of "first choices" for Abbott, and it did not.

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(c) *The Burke Surveys*

Abbott also relies on telephone surveys of pediatricians conducted by Burke Marketing Research in the summer of 1997. These studies were also designed "to support the claim" (*i.e.*, not to "test" the claim). See Ex. 66. In June 1997, Burke asked 300 pediatricians by telephone: "Which of the following infant formulas, if any, is your first choice for a milk-free feeding?" Ex. 432. The available choices were read in alphabetical order: Alimentum, Carnation Alsoy, Gerber Soy, Isomil, Nutramigen, Pregestimil, and ProSoBee. *Id.* The results were:

Isomil	48.7%
ProSoBee	29.7%
Nutramigen	4.3%
Alimentum	3.3%
All others	12.3%
None, do not have a "1st choice"	1.7%

Id.

In July 1997, Burke asked 301 pediatricians by telephone: "Which of the following infant formulas, if any, is your first choice for a milk-based feeding?" Ex. 431 at A022814. The choices, which were read in random order, were: Carnation Follow-Up, Carnation Good Start, Enfamil, Gerber Baby Formula, Lacto-Free, and Similac. The results were:

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Similac	55.5%
Enfamil	37.2%
Carnation Good Start	2.7%
Lacto-Free	2.0%
Others	0.7%
None, don't know	2.0%

Id. In the July 1997 survey, Burke also asked the pediatricians by telephone: "Which of the following specialty infant formulas, if any, is your first choice for a soy-based feeding?" *Id.* at A022815. The available choices were Isomil, ProSoBee, and Carnation Alsoy, read in random order, followed by Other, and "None, do not have a '1st Choice.' " The results as reported to Abbott were:

Isomil	58.8%
ProSoBee	37.5%
Carnation Alsoy	1.3%
All others	0.7%
None	1.6%

Id.[9]

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9. A dispute arose in the hearing concerning whether interviewers for the Burke surveys actually included as options "none," "other," and "do not have a first choice" as they read the list to the participants. The dispute is based on a discrepancy between written questionnaires and a computer diskette about which relatively little is known. See Exs. 64 & 133. On this limited record, the more reliable evidence tends to show that the interviewers did include "other" and "none, do not have a first choice" in the list they read to the participants. See Exs. 431 & 432.

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There is a serious flaw in the Burke survey as fair support for the Abbott claim. The interviewers were instructed to press a doctor for a single "first choice" even if the doctor initially expressed reluctance to do so. The instructions told interviewers that they should not accept multiple responses, that they could accept only one response. To make matters even worse, if the doctor gave multiple responses and persisted in doing so on being asked a second time to identify a "first choice," the interviewers were instructed to treat that response as a "null," or "no answer," meaning that the doctor's response would not even be counted as "None, do not have a '1st choice.' " See Ex. 65 ("none" to be treated as "no answer").

It is not possible to tell from Burke's records how many doctors attempted to respond that they had no single "first choice" formula but provided such a response to the interviewer's second attempt, nor how many doctors insisted on giving multiple responses and thus had their responses not counted at all, not even toward "none." The Burke surveys thus produced "no preference" results that are at the extreme low end of the spectrum of the many market surveys in this record — less than two percent. By excluding from the base an unknown number of doctors who refused to express a single "first choice" even after being pressed to do so, the Burke survey is entitled to little or no weight as support for Abbott's claim.

Thus, among the parties' surveys of doctors designed specifically to test Abbott's "1st Choice of Doctors" claim, the Ross survey provides substantial evidence for finding that the claim is misleading. The Glickman and Burke

surveys, on the other hand, were infected by flaws that undermine the support they might have provided for the claim. The parties have also submitted a host of other surveys of doctors concerning infant formulas, and the court turns next to those surveys.

(d) *Cooper Research "Physician Tracking Studies"*

Abbott has commissioned Cooper Research to conduct surveys of 200 pediatricians twice a year for at least several years. The key questions ask: "Do you have a single preferred brand of infant formula that you usually recommend to your patients?" and then, if the answer is yes, "Which one brand of infant formula is your preferred brand?" Ex. 74 at A050742. The results have been:

	1Q96	3Q96	1Q97	3Q97	1Q98	3Q98
Has no preferred brand	53%	51%	54%	43%	46%	48%
Has a preferred brand	47%	49%	46%	58%	54%	52%
Abbott (all products)	26%	30%	26%	32%	33%	36%
Mead Johnson (all products)	19%	17%	19%	23%	20%	16%

Ex. 74 at A050742. These questions — asking what the pediatrician "usually recommends to your patient" — are aimed at determining how a pediatrician actually exercises his or her professional judgment. These results show

consistently that for no more than one-third of pediatricians is Abbott's Similac a single preferred brand that they usually recommend over Mead Johnson's Enfamil.

Abbott contends the Cooper Research surveys are not inconsistent with its "1st Choice of Doctors" claim because the claim is not limited to doctors who recommend only one brand of formula. The questions in the Cooper Research surveys left room for a doctor to recommend multiple brands to patients but still to have a "first choice" for a particular brand. Abbott's point is correct as a matter of abstract logic, but its argument illustrates the ambiguity of the "1st Choice of Doctors" claim. Most important, the questions in the Cooper Research tracking studies asked for responses that coincide fairly closely with the *consumer* response to the meaning of the "1st Choice of Doctors" claim — that the claim means that doctors exercising their *professional judgments* prefer Abbott's formulas over Mead Johnson's.[10]

The most detailed report from these tracking surveys is from the "Wave 3" survey conducted in January and February 1996. See Ex. 72. That survey reported that 53 percent of pediatricians had "no single preferred brand" of infant formula. Ex. 72 at A017108. (That answer was elicited in response to a "strong filter" question: "Do you have a single preferred brand of infant formula that you usually recommend to your patients?" Ex. 72 at A017261.) The survey also reported that 70 percent of pediatricians viewed "all brands as similar." *Id.* at A017131. Those included

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10. The questions in the Cooper Research study also track closely with Dr. Ross's questions to physicians.

52 percent who did make brand recommendations, consisting of 29 percent who recommended one or two brands based on the service provided by the sales representatives and another 23 percent who recommend one or two brands based on a product preference. *Id.* Among another 29 percent of pediatricians who viewed brands as different, only a meager three percent viewed one brand as better than the others and recommended only that product. *Id.*

By 1997, the percentage of pediatricians who had one preferred brand of formula had declined to 46 percent. Ex. 73 at A016286. The percentage who said an Abbott product was their "one preferred brand" had declined to 26 percent. *Id.*

The most recent Abbott survey, from the third quarter of 1998, is reported in Exhibit 74. The survey in that quarter used some different questions, so the results of prior surveys cannot be compared directly. Nevertheless, Abbott learned that 62 percent of pediatricians viewed all infant formula brands as similar. Ex. 74 at A050733. Only 22 percent of pediatricians recommended one brand primarily. *Id.* Only 9 percent believed one brand was better than all the others. *Id.* In response to the questions about a single preferred brand, the 1998 survey reported that 52 percent of pediatricians had a single preferred brand, with Abbott products preferred by 36 percent and Mead Johnson preferred by 16 percent. *Id.* at A050742.

Other Abbott documents reflect similar overall numbers. Information prepared for a brand review meeting looking to 1998 marketing efforts reported that 71 percent of

pediatricians saw all brands as similar. Ex. 14. Materials that Abbott used to train sales representatives in June 1997 reported that 53 percent of pediatricians did not have a single preferred brand, while 24 percent preferred Similac and 18 percent preferred Enfamil. Ex. 17 at A047703.

In sum, the Cooper Research tracking studies do not support Abbott's claim to be "1st Choice of Doctors" as consumers reasonably understand the claim. The Cooper Research surveys instead tend to support Dr. Ross's conclusion that the claim is misleading.

(e) *Contemporary Pediatrics Studies*

The magazine Contemporary Pediatrics conducted surveys of pediatricians concerning their recommendations with respect to a wide variety of products. In 1997, the relevant questions read as follows:

> "For each product category you recommend OTC [over-the-counter] products, which BRAND NAME PRODUCTS do you recommend most often? (*Please specify ONLY your 1st and 2nd BRAND NAME choices.*)"
>
> "If you *DO NOT* recommend OTC products by SPECIFIC BRAND NAME, please check the box to the right."

Ex. 443 at 49102 (emphases in original). In response to these questions, 363 pediatricians gave some answer with respect to non-soy formulas. Ex. 444 at A049277, A049280. Among

those, 170 identified Similac or other Abbott products as their first choice, 127 identified Enfamil or other Mead Johnson products as their first choice, 61 said they did not recommend specific brands, and there were 5 other responses. The magazine and Abbott calculated percentages based on the 302 pediatricians who said they did recommend specific brands. Using as a base only those participants who said they did recommend specific brands, 56.3 percent listed an Abbott product as their first choice, while 42.1 percent listed a Mead Johnson product as their first choice. But using the more appropriate base of 363, which includes those pediatricians who did and those who did not recommend specific brands, the numbers drop to 46.8 percent for Abbott products and 35.0 percent for Enfamil products. See Ex. 444 at A049277, A049280.

Abbott contends the Contemporary Pediatrics survey results show its "1st Choice of Doctors" claim is "absolutely true." They do not show any such thing. They show only that when the "base" is sufficiently restricted to the sub-group of pediatricians who have meaningful brand preferences, a majority of those doctors recommend Abbott products as their "first choices." That fact may be interesting and useful to marketers competing for market share. But the manipulation of the base needed to produce a "majority" simply is not consistent with a fair reading of Abbott's "1st Choice of Doctors" claim or with consumers' reasonable understandings of the claim. Abbott's interpretation of this study is an example of falsely implying a "majority win" when it had won only a plurality. See Ex. 25 at A050677 (ARF seminar); see also *Gillette Co. v. Norelco Consumer Products Co.*, 946 F. Supp. 115, 124-25 & n.7 (D. Mass.

1996) (in testing electric shaver's claim of superiority over "wet-shaving" in consumer tests, responses in favor of "wet-shaving" and "no preference" should be combined as responses against superiority of electric shaver).

For soy-based formulas, 397 pediatricians gave some answer. Ex. 444 at A049279. Among those, 217 identified Isomil as their first choice, 110 identified ProSoBee, 60 said they did not recommend specific brands, and 10 gave other responses. The magazine and Abbott calculate that 64.4 percent identify Isomil as their first choice and 32.6 percent identify ProSoBee as their first choice, *id.*, but those figures excluded from the base the 60 pediatricians who said they did not recommend specific brands. Using the more appropriate base, which includes the pediatricians who do not recommend specific brands, however, the percentages of "first choice" are 54.7 percent for Isomil and 27.7 percent for ProSoBee. That result is still a majority for Isomil and cannot be explained away by criticizing the survey methodology. This unimpeached majority result, which is also tied directly to pediatricians' actual recommendations to their patients, leads the court to conclude that Mead Johnson has not shown a likelihood of prevailing on its claim that "1st Claim of Doctors" is misleading as applied to Abbott's Isomil formula.

(f) *Mead Johnson's Physician Tracking Studies*

Abbott contends that its "1st Choice of Doctors" claim is also supported by Mead Johnson tracking studies among pediatricians. These studies used samples of 200 pediatricians interviewed by telephone. In five studies

conducted between March 1995 and July 1996, pediatricians were asked first: "Overall, what percent of the time would you say you recommend the one specific brand of infant formula to be used versus recommending several brands and/or allowing the mother to make the brand choice?" Respondents were then asked, "What ONE brand of infant formula do you recommend most often?" Ex. 447 at B3643. The results were as follows:

	3/95	7/95	11/95	3/96	7/96
Recommended several brands and/or allows mother to make the brand choice	49%	49%	47%	53%	49%
Physician recommends one brand	51%	51%	53%	47%	51%

See Ex. 456 at PAR00218. For the question asking what one brand of formula the pediatrician recommended most often, the results were:

Similac or (w/Iron)	45%	48%	45%	47%	44%
Enfamil or (w/Iron)	25%	25%	30%	37%	40%
None	1%	1%	2%	0%	2%
"No one brand"	24%	20%	18%	12%	12%

Ex. 456 at PAR00215. These surveys used weaker filters and recognized that a doctor's recommendation practices could vary from patient to patient. As a result the "no one brand" group was smaller, but Similac's numbers remained less than a majority.

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In December 1997, a similar survey was conducted for Mead Johnson with slightly different questions. A sample of 200 pediatricians was interviewed by telephone. After answering an unusual filter question — "What percentage of the time do you make no recommendation?" — The pediatricians were asked: "What one brand of infant formula do you recommend most often?" The results among pediatricians who recommended formulas were reported as follows:

Similac	63%
Enfamil	32%
None	2%

Ex. 446 at B3578. This survey appears to provide the strongest support yet for Abbott's claim for Similac. The detailed data from the survey show, however, that the 63 percent result was calculated on a base that included all pediatricians who said they ever made brand recommendations, no matter how frequently or infrequently, and did not include the five percent of the total sample who said they never made any brand recommendations. Compare Ex. 447 at B3633-34, Column A (10 pediatricians, or 5 percent of base of 200, said they made no brand recommendation 100 percent of the time, while others made no recommendation with varying frequency), with *id.* at 3643, Column A (63 percent calculated on base of all 190 pediatricians who ever made brand recommendations). Because of the complications resulting from the questions about the frequency with which the pediatrician made any brand recommendations, the survey does not provide reliable support for Abbott's "1st Choice of Doctors" claim. For

example, a later report supplying additional information on this survey appears to indicate that 56 percent of brand recommendations were for more than one brand, while only 34 percent were for one specific brand. See Ex. 445 at PAR00097 (reporting results of national sample).

In January 1998, Mead Johnson repeated the survey among only 55 pediatricians in three cities where Abbott had first introduced its reformulated Similac. When asked what one brand of formula they recommended most often, in that survey 64 percent named Similac, 31 percent named Enfamil, and 2 percent said none. Ex. 445 at PAR 00098. This survey suffers the same limitations as the national survey, see Ex. 445 at PAR00097 (58 percent of recommendations for more than one brand and only 33 percent for one specific brand), plus it involved a very small sample. This survey also does not provide reliable support for Abbott's claim as it is understood by consumers.

Mead Johnson hired MedProbe to conduct a similar study in January 1997 using a sample of 101 pediatricians. These pediatricians were asked: "Of the following choices, which is the most accurate for you personally? YOU PRIMARILY recommend:"

A single brand of routine formula	61%
Similac	44%
Enfamil	17%
Do not primarily recommend a single brand of routine formula	39%

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See Ex. 450 at MP 0082; Ex. 451 at B1664-65. Abbott portrays these results as 71 percent recommending Similac and 27 percent recommending Enfamil. That conclusion uses as the base only those pediatricians who "primarily recommend a single brand." See II Tr. 193-96. Mead Johnson itself used the smaller base in an internal report warning about the results. See Ex. 451 at 1665; cf. Ex. 504 at C-108 (breaking down data as set forth above). As support for the "1st Choice" claim, however, the larger base is relevant, and the result is short of a majority.

In April 1997, Mead Johnson hired Market Measures, Inc. to survey a sample of 100 pediatricians. In a written questionnaire, they were asked: "When you do make a specific recommendation of a single non-specialized (routine) milk-based formula, which brand do you recommend as your Infant Formula of Choice?" The results were:

Abbott (all products)	34%
Mead Johnson (all products)	25%
"Never Recommend One Specific Brand"	38%
"Do not Recommend by and Brand Name"	1%
Other	2%

Ex. 452 at D29. Using the base of only those doctors who make specific recommendations, Abbott interprets these results as 54 percent for Similac and 33 percent for Enfamil. In fact, Mead Johnson itself used the 54 percent and 33 percent figures in internal reports on these results. See Ex. 453 at 1684; Ex. 506 at 4662. The appropriate calculation for present purposes, however, must include in the base those

doctors who do not make specific brand recommendations, leaving Abbott well short of a majority.

Mead Johnson hired Wirthlin Worldwide to conduct one-hour interviews with 103 health care professionals in June 1997. Among the respondents, 52 were pediatricians, 26 were hospital nurses, and 25 were pediatric nurses. They were asked:

> I am going to read you some statements which represent different ways health professionals choose to talk to mothers about formula. For each one I read, please tell me approximately the percentage of times you use this approach when interacting with mothers on the decision to use a specific non-specialized milk-based formula brand. These should add up to 100% (SHOW CHART):
>
> "I recommend (Brand X)."
>
> "All brands are the same. It does not matter what you use."
>
> "All brands are similar. I like (Brand X); it is fine."
>
> "I recommend either (Brand X) or (Brand Y)."

Ex. 454 at G583. Respondents were then asked: "If you had to choose, which brand of infant formula do you personally

prefer?" Ex. 454 at G571. The 52 pediatricians' responses were as follows:

Similac	52%
Enfamil	23%
Other	4%
No Preference	12%
Question not asked	10%

Ex. 454 at G571. This survey produced a result over 50 percent for Similac with an appropriate base, but it did so only with the artificially "forced" choice question, which is not a legitimate test (nor was it designed to be, of course) for testing Abbott's "1st Choice of Doctors" claim. The question beginning "if you had to choose" can be described as the polar opposite of the "strong filter" used by Dr. Ross. Also, the sample size in the Wirthlin Worldwide study was very small.

In 1997 Mead Johnson hired Market Measures Inc. to conduct a survey among 675 pediatricians. The respondents were asked: "Do you ever make non-specialized (routine) milk-based formula BRAND recommendations to parents of NON-WIC babies, or not?" Those who said yes were then asked: "When you do make brand recommendations of non-specialized (routine) milk-based formulas, do you usually:

Recommend a single brand
Recommend multiple brands

Respondents were then asked: "When you do make a *specific* recommendation of a *single non-specialized (routine)*

milk-based formula, which *brand* do you recommend as your Infant Formula of Choice?" Ex. 455 at D06367-68. The results as tabulated by Mead Johnson were as follows:

Abbott (all products)	27.7%
Mead Johnson (all products)	12.4%
Never Recommend One Specific Brand	27.0%
Do Not Make Any Brand Recommendation	28.5%
Other Brands	2.2%
No Answer	2.2%

See Ex. 76 at 18; see also Ex. 455 at C2411-12. Abbott focuses on the 165 respondents in Column E who said they recommend a single brand. Among that sub-group, 60.6 percent said they recommended Abbott products (Similac or Isomil), while 24.8 percent said they recommended Mead Johnson products (Enfamil, ProSoBee, or unspecified). Ex. 455 at C2411 (reverse side). Again, for testing the Abbott claim, however, the base must include the physicians who do not make specific brand recommendations. As a result, the relevant number from this survey is 27.7 percent, well short of a majority.

* * *

Thus, in light of all the evidence presented thus far, the court finds that Mead Johnson has shown a substantial

likelihood of prevailing on its claim that Abbott's use of the "1st Choice of Doctors" claim in its advertising is misleading consumers in two independent respects in violation of the Lanham Act. The claim is misleading first in that consumers reasonably understand it to express the choices of a majority of doctors rather than a mere plurality, and second in that consumers reasonably understand it to express doctors' preferences based on the exercise of their professional judgments rather than superficial or "top of the head" brand familiarity. The Glickman and Burke surveys cited by Abbott do not fairly support the "1st Choice of Doctors" claim as it is reasonably understood by consumers in either respect. Dr. Ross's survey tends to show the claim is not supported in either respect. The numerous other studies of doctor choices/preferences/recommendations which tended to explore professional judgments and practices rather than product familiarity show that Similac has a consistent plurality, but not a majority needed to keep the claim from misleading customers. The "1st Choice of Doctors" claim can be supported, however, as applied to Abbott's Isomil soy-based formula. The court turns next to the additional factors governing the grant or denial of preliminary injunctive relief.

III. *Harm to Mead Johnson*

The Seventh Circuit's decision in *Abbott Laboratories* emphatically followed the "well-established presumption that injuries arising from Lanham Act violations are irreparable, even absent a showing of business loss." 971 F.2d at 16 (collecting cases). In that case the Seventh Circuit vacated the district court's denial of a preliminary injunction despite

the district court's detailed explanation of why it found that the unusual structure of the particular product market rebutted the presumption of irreparable harm. The Seventh Circuit said that the district court had overlooked the "lingering, incalculable" effects of a competitor's misleading advertising campaign. *Id.* at 16-17.

The evidence here is consistent with the presumption of irreparable harm. Abbott has been using the superlative claim — "1st Choice of Doctors" — heavily in its advertising directed at consumers and doctors. Mead Johnson's McCabe pointed out that his sales force must contend every day with that misleading claim as they try to sell Mead Johnson's products. All marketing and market research witnesses agree that the claim is a powerful one, one that has a significant effect on consumer behavior. This is precisely the kind of situation in which the presumption of irreparable harm has a solid foundation. The presumption has not been rebutted here.

Abbott argues, however, that the presumption of irreparable harm should not apply to this case because Mead Johnson waited so long to file suit and seek injunctive relief. Abbott has used other versions of a "1st Choice" claim since 1989 and began using the "1st Choice of Doctors" claim in 1995. Mead Johnson first took legal action against the "1st Choice of Doctors" claim in a proceeding before the Federal Trade Commission in March 1997. Mead Johnson filed this suit in July 1998. Abbott contends the delay alone warrants denial of injunctive relief. See, *e.g.*, *Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 968 (2d Cir. 1995) (inexcusable delay in seeking preliminary injunctive relief "may" undermine presumption of irreparable harm in

Lanham Act case); *Ohio Art Co. v. Lewis Galoob Toys, Inc.*, 799 F. Supp. 870, 887 (N.D. Ill. 1992) (same).

Mead Johnson's delay in filing suit here does not warrant denial of injunctive relief. First, even inexcusable delay is only one factor the court must consider, not necessarily a controlling reason to deny relief. *Ideal Industries, Inc. v. Gardner Bender, Inc.*, 612 F.2d 1018, 1025 (7th Cir. 1979); accord, *Hybritech Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1457 (Fed. Cir. 1988). *Tough Traveler* and *Ohio Art Co.* do not suggest otherwise. The other factors relevant here, including the public interest in stopping misleading advertising and the policy foundations for the general presumption of irreparable harm, weigh in favor of granting relief. In this market there is an almost entirely new set of consumers every few months. Consumers who are misled by deceptive advertising are harmed, and slower relief is better than no relief.

Second, the court does not view Mead Johnson's delay as inexcusable in any event. Although Abbott has used the "1st Choice of Doctors" flag on its product label since sometime in 1995, Mead Johnson's McCabe testified without contradiction that Abbott has been increasing the amount of money spent to push this particular claim. I Tr. 55-56. That is the kind of change in circumstances that could reasonably allow a company in Mead Johnson's position to say that a tolerable situation has become intolerable and is worth the expense and trouble of litigation.

Also, McCabe pointed out that Mead Johnson understandably began to take new interest in the issue when

Abbott used the "1st Choice of Doctors" claim to promote its newly reformulated Similac in 1997. I Tr. 56. Abbott reformulated its Similac product in 1997 with the addition of free nucleotides. Abbott launched the reformulated product with considerable fanfare, and the advertising for the reformulated product featured the "1st Choice of Doctors" claim. Mead Johnson has asked, quite reasonably, how Abbott could claim that a newly reformulated product was the "1st Choice of Doctors" when it had not even been on the market, and how such advertising claims for such a new and improved product could be supported based on surveys of doctors asking about their views on the older, "unimproved" product. See I Tr. 56.

Abbott also argues that the presumption of irreparable harm applies only when the advertising contains direct comparative claims. Both the legal and factual premises of Abbott's argument are wrong. As legal support, Abbott cites *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1336 (8th Cir. 1997), and *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1992), but neither opinion suggests the presumption of irreparable harm is limited to comparative advertising. Abbott also cites *J & M Turner, Inc. v. Applied Bolting Technology Products*, No. CIV. A. 95-2179, 1996 WL 32114, at *12 (E.D. Pa. Jan. 26, 1996), which endorsed such a limitation as one of several grounds for denying injunctive relief. The *J & M Turner* court cited the Seventh Circuit's decision in *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d at 16, but the Seventh Circuit opinion indicates no such limit on the presumption of irreparable harm in Lanham Act cases. *J & M Turner* is not persuasive as establishing such a limit on the presumption.

The factual premise of Abbott's argument is also wrong. The "1st Choice of Doctors" claim is inherently a comparative claim — in fact, it is not merely a comparative claim, but a superlative claim, claiming to be preferred over all other competitors, and especially of course over its chief competitor, Mead Johnson's family of products. See *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 946 (3d Cir. 1993) (advertising claim that motor oil provides "longer engine life and better engine protection" implicitly compared performance to other leading brands). The presumption of irreparable harm applies in this case. These are the sorts of business experiences that provide the foundation for the presumption of irreparable harm.

Abbott also argues that Mead Johnson acted inexcusably by pursuing before the NAD a challenge to Abbott's advertising for the newly reformulated Similac without raising any challenge to the "1st Choice of Doctors" claim in that forum. Mead Johnson obtained some relief through the NAD in which Abbott agreed (the NAD does not have coercive power) to modify its advertising. Abbott argues that the delay caused it to incur costs by changing its advertising in response to the NAD challenge, and that those costs will be for naught if this court orders it to modify its advertising.

The court is not persuaded. First, the changes Abbott made in response to the NAD decision were, from a legal point of view, voluntary changes. The NAD had no authority to order Abbott to make those changes. Second, the federal courts remain the legal forum for adjudicating Lanham Act claims. This court's responsibility is to enforce the Lanham Act and to protect not only competitors but also the public

from deceptive advertising. Third, Abbott has not been at all specific about the costs it incurred in responding to the NAD decision, and the "tens of thousands of dollars" mentioned in Abbott's brief (at page 49) would amount to a minimal expense in the context of this case.

IV. *Harm to Abbott from Injunction*

Mary Gottenborg testified about the harm Abbott would suffer from an injunction. Because the "1st Choice of Doctors" claim is central to Abbott's brand positioning statement and advertising programs for Similac and related products, Gottenborg testified, Abbott will lose market share, goodwill, and brand equity if it is not able to use the claim. II Tr. 276. The logistics of a change would also pose a significant challenge because of labels, packaging, and advertising that would need to be changed. Gottenborg did not try to put any specific dollar figures on potential consequences, other than to say that every point of market share is worth "millions of dollars" to Abbott. II Tr. 279.

Abbott argues that "courts routinely refuse to preliminarily enjoin brand positioning statements." Abbott Br. at 48, citing *Abbott Laboratories*, 971 F.2d at 17, and *Golden Bear Int'l, Inc. v. Bear U.S.A., Inc.*, 969 F. Supp. 742, 747 (N.D. Ga. 1996). The citation to *Abbott Laboratories* does not support the contention. In the cited passage, the Seventh Circuit recognized that an injunction ordering the defendant to recall its product, to stop using the product name, and to change its label would cause serious harm to the defendant. But the Seventh Circuit also pointed out that less drastic relief — prohibiting the defendant from

continuing the false claims and ordering it to issue corrective advertisements and brochures — would not have such drastic consequences, and held that the district court had erred by failing to consider these less drastic alternatives. 971 F.2d at 17.

In this case, Mead Johnson is seeking some of the less drastic forms of relief that the Seventh Circuit discussed in *Abbott Laboratories*. There is no doubt that Abbott will suffer harm if it is ordered to stop using the misleading "1st Choice of Doctors" claim. That harm is not comparable, however, to the harm it would suffer from an order imposing the more drastic forms of relief discussed in *Abbott Laboratories*, such as an order requiring it to change the name of Similac or its other brand names. As set forth below, this court is ordering the less drastic forms of relief which, under the Seventh Circuit's opinion in *Abbott Laboratories*, plainly would have been warranted.

Abbott's citation to *Golden Bear* also provides no meaningful support on this point. In that trademark case, the district court denied preliminary injunctive relief after finding that the "Golden Bear" trademark associated with golfer Jack Nicklaus was not confusingly similar to the defendant's bear trademark and that the parties marketed their products to different markets and through different distribution channels. See 969 F. Supp. at 744-46. In the cited passage, the district court also noted that the defendant had recently changed its logo to avoid counterfeiting, and that another change of its logo would cause ruinous losses for the small, start-up company. *Id.* at 747. As a factual matter, that situation is simply not comparable to the effects

of an order requiring Abbott to stop using the misleading "1st Choice of Doctors" claim in its advertising and labels for Similac. The district court's opinion certainly does not support Abbott's assertion that "courts routinely refuse to preliminarily enjoin brand positioning statements."

Abbott chose to build its brand positioning statement around the ambiguous and ephemeral "1st Choice of Doctors" claim. The claim is, by definition, vulnerable to disproof by the ebbs and flows of professional opinions. Having chosen such a vulnerable foundation, Abbott's argument that correction of the misleading claim would cause it such overwhelming injury that the court should deny relief is not persuasive.

V. *The Public Interest*

Again, the Seventh Circuit's decision in *Abbott Laboratories* provides guidance on this final element of the preliminary injunction standard. The court explained that preliminary injunctive relief ordering the defendant to "purge the false aspects of its promotional campaign and issue corrective advertising" would "serve, rather than disserve, the public interest in truthful advertising, an interest that lies at the heart of the Lanham Act." 971 F.2d at 19 (holding that district court erred by failing to consider whether such limited relief aimed at advertising, rather than forcing removal of product from market, would serve public interest in truthful advertising).

Abbott's "1st Choice of Doctors" claim is also the subject of an investigation by the Federal Trade Commission.

Abbott argues that this court should defer to the FTC, leaving the protection of the public interest to that agency's expertise. Abbott has cited cases in which courts have recognized the FTC's expertise in this area. See *Kraft v. FTC*, 970 F.2d 311, 317, 319 (7th Cir. 1992); *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 (3d Cir. 1990); *Thompson Medical Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986). Abbott also invokes the doctrine of primary jurisdiction, suggesting that this court should take no action pending the outcome of the FTC investigation. See generally *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 654 (1973); *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Because the "1st Choice of Doctors" issue is also before the FTC, Abbott argues, it would be appropriate for this court to take no action on the motion for preliminary injunction. See *American Trucking Ass'ns, Inc. v. ICC*, 682 F.2d 487, 492 (5th Cir. 1982); *Tutoki v. Celebrezze*, 375 F.2d 105, 107 (7th Cir. 1967); *Frontier Communications of Mt. Pulaski, Inc. v. AT & T Corp.*, 957 F. Supp. 170, 176 (C.D. Ill. 1997) (declining to apply doctrine of primary jurisdiction or to defer to FCC).

Abbott has (understandably) stopped short of arguing that primary jurisdiction formally applies to this case. See Abbott Br. at 51. Where Congress has provided for private enforcement of federal law, it has done so for a reason. Public law enforcement agencies have limited resources, staffs, and dockets. By allowing for private enforcement of federal laws, as it has in the Lanham Act, Congress has made it clear that courts, and parties seeking courts' help in enforcing the law, need not wait for other agencies to get around to making a decision in a closely related matter. See *Porous Media Corp.*

v. Pall Corp., 110 F.3d at 1335-36 n.8 ("Congressional policy appears to encourage commercial firms to act as the fabled 'vicarious avenger' of consumer rights."), quoting 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27.04(3)(d), at 27-48 (3rd ed. 1996). In fact, in cases like this one, where a well-financed competitor brings a private claim under the Lanham Act, the FTC might reasonably decide to focus its limited resources in other directions, where private parties are not trying to take on the role of "private attorneys general."

VI. *The Scope of Injunctive Relief*

Mead Johnson has met its burden on all four elements necessary for preliminary injunctive relief. It has shown a substantial likelihood of prevailing on the merits of its claim that "1st Choice of Doctors" violates § 43(a)(1)(B) of the Lanham Act as applied to Abbott's Similac brand. Mead Johnson has also shown that it is suffering irreparable harm from the misleading advertising. Although a preliminary injunction will cause harm to Abbott, that harm and the risk that it will be inflicted erroneously do not outweigh the need for injunctive relief to protect the public and Mead Johnson from continuing harm. The public has a substantial interest in injunctive relief here.

Neither side has addressed in detail the appropriate scope of relief. The Seventh Circuit decision in *Abbott Laboratories* shows the need to confine the scope of injunctive relief to that which is needed to prevent the harm. See 971 F.2d at 17-18 (district court erred by failing to consider relief less draconian than blocking sales of defendant's products). The

actionable, irreparable harm here stems from Abbott's use of the claim "1st Choice of Doctors" and from nothing else.

Accordingly, the court is issuing a preliminary injunction today with the following provisions:

(1) Beginning April 5, 1999, Abbott Laboratories shall not distribute, mail, broadcast, or otherwise advertise in any medium in the United States its Similac infant formula or any other infant formula (with the exception of the Isomil brand) using the claim "1st Choice of Doctors."

(2) Beginning April 12, 1999, Abbott Laboratories shall not include the claim "1st Choice of Doctors" on the labels and packaging for its Similac infant formula or any other infant formula (with the exception of the Isomil brand) in the United States. This provision shall not prevent Abbott Laboratories from selling or distributing labelled inventory of Similac or other brands that Abbott Laboratories has on-hand as of April 12, 1999.

(3) The injunction shall apply to defendant Abbott Laboratories, its officers, directors, employees, attorneys, and agents, and to other persons in active concert with Abbott Laboratories who have actual notice of the preliminary inunction.

(4) The injunction shall remain in effect pending further order of the court.

Neither side has offered specific arguments on an appropriate value of security for the injunction under Rule

65(c). In view of the stakes involved, and in the absence of further guidance from the parties, the preliminary injunction shall take effect only if Mead Johnson posts no later than March 28, 1999, a bond or other security in the sum of One Million Dollars ($1,000,000).

Conclusion

For the foregoing reasons, Mead Johnson's motion for preliminary injunction is granted to the extent set forth above.

Date: March 18, 1999

s/ David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Appendix D

MODIFIED PRELIMINARY INJUNCTION OF APRIL 13, 1999

On March 18, 1999, this court issued a preliminary injunction under the Lanham Act against defendant Abbott Laboratories relating to use of its advertising claim "1st Choice of Doctors." On March 25, 1999, Abbott filed an emergency motion seeking modification of deadlines in the original injunction. Abbott has argued primarily: (a) that it could not physically comply with the original timetable for modifying its packaging and labeling; (b) that certain promotional materials had substantial educational content and value, and made only minimal use of the deceptive claim; (c) that other promotional materials made only incidental use of the deceptive claim (most often in photographs of Similac packages showing the "1st Choice of Doctors" claim in small, barely legible print).

The court made certain interim modifications after a hearing on March 26, 1999, and set the matter for a further hearing that was held on April 13, 1999. The court's findings of fact and conclusions of law supporting the injunction are set forth in the court's entry of March 18, 1999, and remain in effect. With respect to the modifications requested by Abbott and Mead Johnson's objections, the court has set forth its reasons for the modifications in open court.

Resolving these matters has required the court to examine numerous promotional pieces distributed by Abbott and to use the court's equitable judgment to balance the need for effective preliminary injunctive relief against practical limitations on modifying packaging and advertising on short

notice, as well as to recognize specific situations in which insistence on very short deadlines for compliance would add little or nothing to serve the purpose of the Lanham Act and the central provisions of the injunction. As the court stated at the hearing on March 26, 1999, the court also recognizes the plaintiff's delays in seeking preliminary injunctive relief and the time the court took to decide the issue indicate that some flexibility in deadlines is equitable here. After considering the parties' written submissions, testimony, and argument on these matters, and the court now modifies the preliminary injunction to require as follows:

1. The requirement that plaintiff post bond of $1,000,000 as security for preliminary injunctive relief shall remain in effect, without increase in the amount required. As the court stated on March 26, 1999, if Abbott thought a larger bond was necessary, the time to present evidence was before the injunction was issued, not afterwards.

2. No later than Friday, April 2, 1999, Abbott Laboratories shall post on the Internet web site for its nutritional products group notice of this court's injunction, including the court's finding that Mead Johnson has shown a substantial likelihood of prevailing on its claim that the "1st Choice of Doctors" claim is deceptive and misleading in violation of the Lanham Act, and defendant shall delete from that site and other sites defendant controls other references to its "1st Choice of Doctors" claim, except as the claim applies to the Isomil brand. (Abbott has already complied with this portion of the order.)

3. Beginning April 19, 1999, Abbott Laboratories shall not include the claim "1st Choice of Doctors" on the labels

and packaging for its Similac infant formula or any other infant formula (with the exception of the Isomil brand) in the United States for the following items: Similac 14.1 ounce size powder (high iron); Similac 13 ounce size concentrate (high and low iron); Similac 32 ounce size ready-to-feed plastic (high iron); Similac 8 ounce size ready-to-feed liquid can (high and low iron); Similac retail pouch (high iron). This provision shall not prevent Abbott Laboratories from selling or distributing labeled inventory of these items that Abbott Laboratories has on-hand as of April 19, 1999. (The priority given to these high-volume items is consistent with the court's directives on March 26, 1999.)

4. Beginning June 14, 1999, Abbott Laboratories shall not include the claim "1st Choice of Doctors" on the labels and packaging for its Similac infant formula or any other infant formula (with the exception of the Isomil brand) in the United States in its 4 ounce and 2 ounce packages provided to hospitals and clinics. This provision shall not prevent Abbott Laboratories from selling or distributing labeled inventory of these items that Abbott Laboratories has on-hand as of June 14, 1999.

5. Beginning June 7, 1999, Abbott Laboratories shall not include the claim "1st Choice of Doctors" on the labels and packaging for its Similac infant formula or any other infant formula (with the exception of the Isomil brand) in the United States for any product items not covered by Paragraphs 3 and 4, above. This provision shall not prevent Abbott Laboratories from selling or distributing labeled inventory of the items covered by this paragraph that Abbott Laboratories has on-hand as of June 7, 1999.

Appendix D

6. Except as provided below in Paragraphs 8 and 9, beginning April 19, 1999, Abbott shall not distribute, mail, broadcast, or otherwise advertise in any medium in the United States its Similac infant formula or any other infant formula (with the exception of the Isomil brand) using the claim "1st Choice of Doctors."

7. Abbott Laboratories has filed with the court a list and copies of its so-called core advertising materials that exploit the "1st Choice of Doctors" claim. As to all such materials, Abbott Laboratories shall not distribute, mail, or otherwise use such materials in the United States beginning Monday, April 12, 1999.

8. Abbott shall be permitted to continue to distribute certain promotional items with a substantial educational content, even those items containing the "1st Choice of Doctors" claim, until current inventory runs out. The items that are subject to this treatment are the following exhibits in Appendix A, filed with the court under seal on April 2, 1999: Exhibits 1-6; Exhibits 8-11; Exhibit 13; Exhibits 32-34; Exhibit 37; Exhibit 40.

9. Abbott shall be permitted to continue to distribute certain promotional items that make only incidental use of the "1st Choice of Doctors" claim through May 31, 1999. The items that are subject to this treatment are the following exhibits in Appendix C, filed with the court under seal on April 2, 1999: Exhibits 85-112; Exhibits 116-117; Exhibits 120-126. Also subject to this treatment are the following exhibits in Appendix A, filed with the court under seal on April 2, 1999: Exhibits 12; Exhibits 14-16; Exhibit 23. As to all Exhibits in Appendix A and Appendix C which are not

mentioned in Paragraphs 8 or 9, the general prohibition on advertising using the "1st Choice of Doctors" claim applies beginning April 19, 1999. Abbott may, however, cover or "sticker" the "1st Choice of Doctors" claim if it wishes to continue distributing those materials already in its inventory.

10. This modified preliminary injunction supersedes the preliminary injunction issued in this action on March 18, 1999, and as modified on March 26, 1999. This modified preliminary injunction applies to defendant Abbott Laboratories, its officers, directors, employees, attorneys, and agents, and to other persons in active concert with Abbott Laboratories who have actual notice of this modified preliminary injunction.

11. Defendant Abbott Laboratories has requested clarification as to whether the preliminary injunction would prohibit use of the claims "First Choice of Doctors With a Preference" or "# 1 Doctor Preferred Among Those With a Preference." As the court stated in open court on March 26, 1999, neither the original preliminary injunction nor this modified preliminary injunction would prohibit use of those claims so long as the modifying phrase is not minimized. As to whether such claims would be deceptive or misleading, the court can say only that the record presented thus far would not show that either of these qualified claims would be deceptive or misleading in either of the two respects that the court found deceptive and misleading about the unqualified "1st Choice of Doctors" claim.

12. This modified preliminary injunction shall remain in effect pending further order of the court.

So ordered.

APPENDIX E — RELEVANT STATUTES

15 U.S.C. § 1125

§ 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

> **(A)** is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> **(B)** in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her

official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

(c) Remedies for dilution of famous marks

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to —

(A) the degree of inherent or acquired distinctiveness of the mark;

(B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;

(C) the duration and extent of advertising and publicity of the mark;

(D) the geographical extent of the trading area in which the mark is used;

(E) the channels of trade for the goods or services with which the mark is used;

(F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;

(G) the nature and extent of use of the same or similar marks by third parties; and

(H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(2) In an action brought under this subsection, the owner of the famous mark shall be entitled only to injunctive relief as set forth in section 1116 of this title unless the person against whom the injunction is sought willfully intended to

trade on the owner's reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity.

(3) The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution of the distinctiveness of a mark, label, or form of advertisement.

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.

(d) Cyberpiracy prevention

(1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that —

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of Title 18 or section 220506 of Title 36.

(B)(i) In determining whether a person has a bad faith intent described under subparagraph (a), a court may consider factors such as, but not limited to

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name

that is otherwise commonly used to identify that person;

(III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain

accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c)(1) of this section.

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2)(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if

> **(i)** the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and
>
> **(ii)** the court finds that the owner —
>
> > **(I)** is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or
> >
> > **(II)** through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by —
> >
> > > **(aa)** sending a notice of the alleged violation and intent to proceed under this

paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D)(i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint

filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall

> **(I)** expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and
>
> **(II)** not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.

* * *

Appendix E

15 U.S.C. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless —

> **(A)** such methods of competition have a direct, substantial, and reasonably foreseeable effect —

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall

have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of

the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order

of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional

evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such

person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final —

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section.

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by —

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for

review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed —

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed —

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of

continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice,

then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice —

> **(1)** after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> **(2)** with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall

be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

* * *

Appendix E

15 U.S.C. § 52

§ 52. Dissemination of false advertisements

(a) Unlawfulness

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement —

> **(1)** By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics; or
>
> **(2)** By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

* * * *

APPENDIX F — FORMULA PERCEPTION STUDY QUESTIONNAIRE

FORMULA PERCEPTION STUDY QUESTIONNAIRE
SWA5536 // May, 1998

ID#
DO NOT WRITE IN THIS BOX

R2

Start Time: _____ Stop Time: _____

HAVE RESPONDENT PUT ON EYEWEAR IF USED AT SCREENER Q G.1/G.2 IF UNAVAILABLE OR REFUSED, THANK, TALLY AND TERMINATE.

(NO EYEWEAR) 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16

REMOVE THE INFANT FORMULA FROM THE BAG, AND HAND TO THE RESPONDENT MAIN FACE FORWARD.

INTRO: I'd like you to look at this infant formula product just as you would if you saw it for sale in a store. This is just an example of the different versions this product comes in. After you have finished looking at it, I'll be asking you just a few questions about it. Please take as long as you'd like, and let me know when you've finished looking.

(WHEN RESPONDENT SAYS SHE IS FINISHED, SAY:)

For any of my questions, if you don't know the answer or don't have an opinion, please tell me that rather than taking a guess.

Appendix F

1. I'd like to direct your attention to *this* part of the label.

   (USING RIGHT INDEX FINGER TOUCH BLUE RIBBON PORTION OF LABEL CONTAINING LANGUAGE "1ST CHOICE OF DOCTORS".)

   Please tell me what you *understand* this part of the label to communicate to you? **(RECORD VERBATIM. PROBE UNTIL UNPRODUCTIVE WITH:)** Anything *else* that communicates to you?

   (THEN, CLARIFY FULLY FOR SPECIFIC RESPONSES USING RESPONDENT'S OWN WORDS. RECORD VERBATIM.)

   _____

   _____

   _____

   _____

   _____

   _____

   CONTINUE TO Q.2.

2. Although you may already have mentioned this, what do you *understand* the wording "*1ST CHOICE*" to communicate to you? **(RECORD VERBATIM. PROBE UNTIL UNPRODUCTIVE WITH:)** Anything *else* that communicates to you?

Appendix F

(THEN, CLARIFY FULLY FOR SPECIFIC RESPONSES USING RESPONDENT'S OWN WORDS. RECORD VERBATIM.)

_____

_____

_____

_____

_____

CONTINUE TO Q.3a.

3a. And although you may already have mentioned this, if you have an opinion, what *reason* or *reasons* do you think *this* product was "*1ST CHOICE OF DOCTORS*"? **(RECORD VERBATIM. PROBE UNTIL UNPRODUCTIVE WITH:)** Any *other* reason or reasons? **(RECORD VERBATIM.)**

[ ] NO OPINION/DON'T KNOW → **SKIP TO Q.4.**

_____

_____

_____

_____

_____

3b. And *why* do you say that? **(RECORD VERBATIM. PROBE ONCE WITH:)** Any *other* reasons you say that?

_____

_____

_____

_____

CONTINUE TO Q.4.

Appendix F

4. Although you may already have mentioned this, if you have an opinion, what *kind* or *kinds* of doctors do you think the word "*DOCTORS*" refers to on *this* part of the label? **(USING RIGHT INDEX FINGER, TOUCH BLUE RIBBON PORTION OF LABEL CONTAINING LANGUAGE "1ST CHOICE OF DOCTORS".)**

   (RECORD VERBATIM. PROBE UNTIL UNPRODUCTIVE WITH:) Any *other* kind or kinds of doctors?

   (THEN, CLARIFY FULLY FOR SPECIFIC RESPONSES USING RESPONDENT'S OWN WORDS. RECORD VERBATIM.)

   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

   CONTINUE TO Q.5.

5. Now, suppose that a *survey* of doctors had been conducted by the company which makes this product and that they were relying on the *results* of that survey to make the statement you see *here*.

Appendix F

(USING RIGHT INDEX FINGER, TOUCH BLUE RIBBON PORTION OF LABEL CONTAINING LANGUAGE "1ST CHOICE OF DOCTORS".)

If you have an opinion, in order for this statement to be *true*, *what percent* of those doctors would have had to say *this* product was their *first choice*? **(RECORD VERBATIM. PROBE ONCE WITH:)** And *why* do you say that?

(THEN, CLARIFY FULLY FOR SPECIFIC RESPONSES USING RESPONDENT'S OWN WORDS. RECORD VERBATIM.)

_____

_____

_____

_____

CONTINUE TO Q.6.

6. I'd like you to look at this card so you can follow along with what I'm reading to you about that survey. **(HAND DISPLAY CARD TO RESPONDENT.)** Suppose that in that possible survey, the doctors were asked, "What brand of infant formula, if any, is your first choice?" And suppose that the results were that *50%* of the doctors said they had *no* first choice, *30%* said *Similac* was their first choice, and that *20%* said their first choice was *another* brand. If those were the results of the survey, would you say that this statement **(USING RIGHT INDEX FINGER, TOUCH BLUE RIBBON PORTION OF LABEL CONTAINING LANGUAGE "1ST CHOICE OF DOCTORS")** is *not accurate* or

would you say that this statement is *accurate*, or *don't* you have an opinion about that one way or the other?

2 NOT ACCURATE → **CONTINUE TO Q.6a**

1 ACCURATE → **CONTINUE TO Q.6a**

3 NO OPINION/DK → **CONTINUE TO Q.6a**

6a. And *why* do you say that? **(RECORD VERBATIM.)**

_____

_____

_____

TAKE BACK DISPLAY CARD AND REMOVE FROM VIEW. CONTINUE TO Q.7.

7. Now, I'd like you to look at *this* part of the label again. **(USING RIGHT INDEX FINGER, TOUCH BLUE RIBBON PORTION OF LABEL CONTAINING LANGUAGE "1ST CHOICE OF DOCTORS".)** If you have an opinion, would you say that this part of the label *does not* or *does* communicate to you anything about the *number* of *versions*, such as powder, concentrate or ready-to-feed, that this product *comes* in, or don't you know?

2 DOES NOT COMMUNICATE ABOUT NUMBER OF VERSIONS → **CONTINUE TO Q.7a**

1 DOES COMMUNICATE ABOUT NUMBER OF VERSIONS → **CONTINUE TO Q.7a**

3 NO OPINION/DON'T KNOW → **SKIP TO Q.8**

Appendix F

7a. And *why* do you say that? **(RECORD VERBATIM.)**

_____

_____

_____

CONTINUE TO Q.8.

8. Just for categorization purposes, I'd like to ask you a few more questions. Your answers will be strictly confidential. Would you say that the place where you live is . . . **(READ LIST)**

1 a large metropolitan area with 50,000 or more inhabitants,

2 a city or town with at least 2500 but less than 50,000 inhabitants,

3 a town or rural area with less than 2500 inhabitants,

4 or don't you know?

5 REFUSED

CONTINUE TO Q.9.

Appendix F

9. Please tell me how many children you have in each of the following age groups. **(READ LIST)**

AGE GROUPS	NUMBER OF CHILDREN
A – Newborn to fifteen months old	_____**
B – Over fifteen months old to four years old	_____
C – Over four years old to ten years old	_____
D – Over ten years old to eighteen years old	_____
E – Over eighteen years old	_____
F – REFUSED	

**** IF ONE OR MORE CHILDREN AGE FIFTEEN MONTHS OR *YOUNGER*, CONTINUE TO Q.9a. OTHERWISE, SKIP TO Q.10.**

**9.a During the first 12 months of your youngest child's life, what type of doctor was the primary health care provider for that child?

_____

CONTINUE TO Q.10.

Appendix F

10. Are you an expectant mother, either pregnant or ready to adopt?

1 YES, PREGNANT → **CONTINUE TO Q.10a**

2 YES, READY TO ADOPT → **SKIP TO Q.10b**

2 NO → **SKIP TO Q.11**

3 REFUSED → **SKIP TO Q.11**

10.a In what month of your pregnancy are you?
_____ → **SKIP TO Q.11**

10.b In how many months will you be adopting?
_____ → **CONTINUE TO Q.11**

11. In the last trimester of your most recent pregnancy, what type of doctor did you, or do you, see most often for pre-natal care?

_____

CONTINUE TO Q.12.

Appendix F

12. Those are all the questions I have for you. Thank you very much for your help. I would appreciate it if you would not speak with others about this study for at least a week or so until we have finished the survey. Again, let me assure you that your answers will remain strictly confidential. Before you go, may I ask if you would please sign the Certification Page just in case the research company wants to verify that I interviewed you?

IF RESPONDENT REFUSES EITHER NAME OR INITIALS AND/OR REFUSES PHONE NUMBER, HAVE YOUR SUPERVISOR ON-SITE VALIDATE THE INTERVIEW WHILE THE RESPONDENT IS PRESENT.

BE SURE THAT YOU (THE INTERVIEWER) COMPLETE THE INTERVIEWER CERTIFICATION BOX.

STAPLE THE SCREENER TO THE FRONT OF THE MAIN QUESTIONNAIRE.

Appendix F

RESPONDENT CERTIFICATION

I certify that I was shown some infant formula and asked some questions about it.

_____ ____/____/ 98

RESPONDENT SIGNATURE DATE

PRINT ***PRINT***

RESPONDENT INFORMATION BOX

PRINT FULL NAME: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

PHONE: (_____) _____

Appendix F

INTERVIEWER CERTIFICATION

I certify that I conducted this interview in accordance with instructions.

INTERVIEWER'S FULL NAME: _____
(PRINT)

_____ / / 98
INTERVIEWER'S SIGNATURE DATE

IF RESPONDENT REFUSES NAME OR PHONE NUMBER, SUPERVISOR MUST SIGN BELOW WHILE RESPONDENT IS PRESENT TO ON-SITE VALIDATE.

_____ / / 98
SUPERVISOR'S SIGNATURE DATE

Appendix F

DISPLAY CARD FOR POSSIBLE SURVEY OF DOCTORS

QUESTION: What brand of infant formula, if any, is your first choice?

RESULTS:

50% — Said they had no first choice

30% — Said Similac was their first choice

20% — Said another brand was their first choice

100% — Total doctors surveyed

(2)

Supreme Court, U.S.
FILED
AUG 11 2000
OFFICE OF THE CLERK

No. 00-71

IN THE

Supreme Court of the United States

MEAD JOHNSON & CO.,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Was the Seventh Circuit correct that, where an advertising claim is based on test data, it is inappropriate for a court to rely on the views of consumers to determine the adequacy and sufficiency of the supporting data?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Abbott Laboratories, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

This false advertising case involves a straightforward medical endorsement claim made by respondent Abbott Laboratories: that SIMILAC Infant Formula is the "1st Choice of Doctors". The claim is similar to those made for dozens of well-known health care products. Medical endorsement claims are "objectively verifiable": they can — and indeed must — be substantiated by surveys of doctors or other medical professionals. Whether a particular survey substantiates the claim in question depends upon the methodological validity of the survey and a statistical analysis of its results. In this case, twelve doctor surveys — eight of them commissioned by petitioner Mead Johnson ("Mead") — unanimously show that SIMILAC is significantly preferred by doctors over Mead's ENFAMIL.

At Mead's urging, the District Court dealt with Abbott's claim in an extraordinary manner. Under the pretense that it was utilizing consumer research to interpret the "message" of the claim, Mead proffered the results of a consumer survey conducted by its consultant, Dr. Ivan Ross. By inviting the respondents to guess as to the *level* of doctor preference for SIMILAC in order for the claim to be true, Dr. Ross elicited consumer opinion that a *majority* of doctors surveyed must prefer SIMILAC. The District Court accepted this survey as proof that Abbott's claim somehow communicates the message that at least 50% of doctors recommend SIMILAC over ENFAMIL.

The District Court's ruling was an unprecedented one. Had it stood, it would have had enormous consequences for companies that utilize professional endorsement claims, or other objectively verifiable claims, in their advertising. Prior to this

case, questions regarding the adequacy of an advertiser's claim substantiation have been the province of scientists, statisticians and market research experts. But under the District Court's decision, the adequacy of the advertiser's substantiation was suddenly turned into a consumer plebiscite. The District Court's rationale would have been applicable to the evaluation of substantiation for all types of objectively verifiable claims, not just medical endorsement claims. Under the District Court's approach, advertisers would never know whether the substantiation they possessed was adequate to support their advertising; the sufficiency of that substantiation would always be subject to the whims of a consumer survey commissioned by a resourceful competitor.

The Seventh Circuit rightly rejected the District Court's novel approach. While acknowledging that consumer research is properly used in false advertising cases to determine the *meaning* of vague or ambiguous advertising claims, the court ruled that consumer research may not be used to determine the *level of substantiation*, or verification, that an advertiser should possess in order to render its advertising truthful.

Contrary to Mead's argument (Pet. 1), the Seventh Circuit's decision does not threaten to "turn 20 years of Lanham Act jurisprudence on its head." To the contrary, it was the District Court's decision that turned advertising law upside down. The Seventh Circuit wisely returned matters of claim substantiation to the playing field where they belong, i.e., the testimony of scientists, statisticians and market research experts. The Seventh Circuit's decision is consistent with well-established Lanham Act jurisprudence and should not be disturbed.

A. Abbott's "1st Choice of Doctors" Claim

Abbott's claim, in its entirety, is that SIMILAC is the:

"1st Choice of Doctors."

This is Abbott's primary claim for SIMILAC. It appears by itself inside a blue ribbon on the label of each of the 64 different packages in which SIMILAC is sold. While it also appears in hundreds of educational and promotional materials targeted to consumers, it generally appears as a free-standing claim that is unamplified by other advertising copy. At no time has Abbott ever stated, suggested or implied that a particular number or percentage of doctors choose SIMILAC over other brands. A typical SIMILAC label showing this unadorned claim is annexed as Appendix A.

Abbott's claim is a typical professional endorsement claim. It communicates the obvious message that doctors recommend SIMILAC more than any other brand. Such claims are common for medical products sold to consumers. As can be seen from the list of claims presented in Appendix B, many leading health care products are promoted as the brand most often recommended by doctors. Like Abbott's claim, none of these claims refers to the number or percentage of doctors who share the preference for the product in question.

B. The Twelve Doctor Surveys

To substantiate its "1st Choice of Doctors" claim, Abbott commissioned a series of doctor surveys by independent market research firms. As it turned out, Mead had also commissioned several doctor surveys in the normal course of its business. In addition, both parties were privy to doctor surveys conducted

by third parties, such as pediatric magazines; these surveys included questions relating to doctors' infant formula preferences.

All told, twelve doctor surveys were before the trial court. In all twelve, SIMILAC was significantly preferred over ENFAMIL. In most cases, the preference was by a ratio of approximately 2 to 1 (MJ App. C at 10a).[1] The Seventh Circuit recognized that a 2 to 1 preference could be meaningless if the "absolute" preference levels were extremely low, such as 1% or 2% (*Id.*). But that was not the case here. Set forth below are the results from the twelve surveys.

1. Surveys Where A Majority Of Doctors Preferred SIMILAC

(1) Glickman Study (MJ App. D at 56a)

Question: "Which of the following routine infant formulas, if any, is your 'first choice' for a MILK-based feeding?"

SIMILAC	52%
ENFAMIL	34%

(2) Burke Survey (*Id.* at 64a)

Question: "Which of the following infant formulas, if any, is your 'first choice' for a MILK-based feeding?"

SIMILAC	55.5%
ENFAMIL	37.2%

1. References to "MJ App." refer to the appendices to Mead's Petition.

(3) Mead's Tracking Study (*Id.* at 74a)

Question: "What one brand of infant formula do you recommend most often?"

SIMILAC	63%
ENFAMIL	32%

(4) Mead's 3-City Tracking Study (*Id.* at 75a)

Question: "What one brand of infant formula do you recommend most often?"

SIMILAC	64%
ENFAMIL	31%

(5) Wirthlin Worldwide (*Id.* at 77a-78a)

Question: "If you had to choose, which brand of infant formula do you personally prefer?"

SIMILAC	52%
ENFAMIL	23%

(6) Contemporary Pediatrics (*Id.* at 70a)

Question: "For each product category you recommend OTC products, which BRAND NAME PRODUCTS do you recommend most often?

SIMILAC	55.6%
ENFAMIL	39.1%

(7) Market Measures (*Id.* at 79a)

Question: "When you do make a specific recommendation of a single non-specialized (routine) milk-based formula, which brand do you recommend as your Infant Formula of Choice?"

SIMILAC	60%
ENFAMIL	23%[2]

2. Surveys Where A Plurality Of Doctors Preferred SIMILAC

(1) Cooper Research Tracking Study (*Id.* at 67a)

Question: "Do you have a single preferred brand of infant formula that you usually recommend to your patients?"

SIMILAC	36%
ENFAMIL	16%

(2) Mead Tracking Study (*Id.* at 73a)

Question: "What ONE brand of infant formula do you recommend most often?"

SIMILAC	44%
ENFAMIL	40%

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2. The District Court removed studies six and seven from the "majority" preference category by accepting retabulations, made by Mead's attorneys, that reduced the preference for SIMILAC below 50%.

(3) Ivan Ross Litigation Study (*Id.* at 52a)

Question: "First, thinking only about two brands of nonspecialized milk-based infant formula with iron, SIMILAC With Iron and ENFAMIL With Iron, do you or don't you have a preference between the two brands?" (If 'yes'): Which brand do you prefer?"

SIMILAC	25%
ENFAMIL	10%

(4) Medprobe Study (*Id.* at 75a)

Question: "Of the following choices, which is most accurate for you personally? You primarily recommend. . . ."

SIMILAC	44%
ENFAMIL	17%

(5) Market Measures, Inc. (*Id.* at 76a)

Question: "When you do make a specific recommendation of a single non-specialized (routine) milk-based formula, which brand do you recommend as your Infant Formula of Choice?"

SIMILAC	34%
ENFAMIL	25%

This data vividly demonstrates the validity of the "1st Choice" claim. It also demonstrates the fallacy of the approach adopted by the District Court. Under that approach, rather than focusing on whether this data is valid and meaningful in the eyes of market research experts, the focus was on the level of data consumers believe should be necessary, even though they have no knowledge or experience in evaluating market research. This approach, had it been permitted to stand, would have been a disservice to the advertising and marketing research communities by saddling them with perpetual uncertainty as to the level of substantiation that is required for professional endorsement claims. The Seventh Circuit properly recognized that the sufficiency of an advertiser's substantiation must be measured against uniform principles that the advertiser can discern in advance, rather than against after-the-fact data generated by a competitor's survey.

C. Mead's Consumer Research

The District Court's conclusion that Abbott's claim communicates the message that a *majority* of doctors choose SIMILAC over ENFAMIL was based upon a consumer survey commissioned by Mead's attorneys and conducted by Professor Ivan Ross. The first few questions were standard questions that asked about the message communicated by Abbott's claim (MJ App. D at 38a-39a). Those questions yielded no playback regarding the percentage of doctors that choose or recommend SIMILAC. This is undoubtedly why Dr. Ross included Question 5. Question 5, however, did not ask consumers to interpret the claim. Rather, it asked them to opine about the percentage of doctors who would have to prefer SIMILAC *in order for the claim to be true*. Thus it asked (*Id.* at 39a-40a):

> Now, suppose that a *survey* of doctors had been conducted by the company which makes this product and that they were relying on the *results* of that survey to make the statement you see *here*. ["1st Choice of Doctors"]. If you have an opinion, in order for this statement to be *true*, *what percent* of those doctors would have had to say *this* product was their *first choice*?

This question elicited a wide range of opinion. While 52% of the respondents believed that at least 50% should be required, 24% believed that 90% was required and 7% believed that 100% was required. (A breakdown of these responses is shown in Abbott's Appendix C.) The District Court utilized these responses to impose a requirement that at least 50% of doctors must choose SIMILAC in order for the claim to be true. Yet there was no magic about the 50% level: 60% of the respondents said the requirement should be 75% or higher, 46% said it should be 80% or higher, and 33% said it should be 90% or higher (*see* Appendix C). Under Mead's theory, the District Court could just as easily have imposed any of these higher levels as the requisite level of preference. Likewise, if an identical claim were made for a different product (*e.g.*, VICKS CHLORASEPTIC is "#1 Dr. Recommended"), another court in another lawsuit would be free to impose any of these higher levels as the requisite percentage. This would create permanent uncertainty as to what level of preference must be shown in order to substantiate a professional endorsement claim. The Seventh Circuit therefore ruled that the District Court's reliance on this question, and the follow-up Question 6 (which provided a hypothetical set of data and asked whether the claim would be truthful in light of that data), was erroneous.

THE DECISION BELOW

Mead has mischaracterized the decision below. According to Mead, the Seventh Circuit has created a "gargantuan hurdle" for Lanham Act plaintiffs by "categorically rejecting as irrelevant" the perceptions of consumers to whom advertising claims are targeted (Pet. 5). According to Mead, this represents a sea change in Lanham Act advertising jurisprudence because (Pet. 3):

> Survey evidence as to consumer understanding of the message conveyed . . . has been critical in such litigation.

But Mead's argument is based on a mistaken premise. Its premise is that the consumer research that the District Court relied on was evidence of consumer understanding of "the message conveyed" by Abbott's claim. But the research was not addressed to consumer perception of the *message* conveyed by the "1st Choice" claim; rather, it was addressed to consumer opinion regarding the *level of substantiation* Abbott possessed to support its claim.

The Seventh Circuit made this destination clear in both of its opinions. In its original opinion, the Seventh Circuit pointed out that it was improper for the District Court to utilize Mead's survey to determine the *level* of substantiation that Abbott must possess in order to substantiate this "objectively verifiable" claim (MJ App. C at 14a):

> There is a deeper problem: the use of a survey in the first place. Surveys are accepted ways to probe for things such as confusion about the source of goods, for confusion depends on the effect of a

> phrase or trade dress on the consumer. . . . So far as we can tell, however, never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held.

Thereafter, Mead filed a Petition for Rehearing *En Banc*. In that petition, Mead made the same argument that it makes here: that the decision is at odds with established case law that encourages the use of survey evidence to determine the message communicated by advertising that is vague or ambiguous. The Seventh Circuit rejected this interpretation of its decision. As it explained (MJ App. A at 5a-6a):

> None of this calls into question the understanding, expressed by many decisions, that whether a claim is either "false" or "misleading" is an issue of fact rather than law. See *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d at 13-15; *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943-45 (3d Cir. 1993); *Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992). Our fundamental conclusion is that a producer cannot make a factual issue just by conducting surveys about how science is done (or, worse, about how surveys should be conducted). The sort of survey evidence Mead Johnson gathered would not support a conclusion by a reasonable person that Abbott's claim either was false or implied a falsehood.

Accordingly, Mead's entire Petition, including its "Question Presented", proceeds from an erroneous premise.

Just as Mead's survey does not represent evidence of consumer "take-away" of the message communicated by Abbott's claim, the Seventh Circuit's opinion does not represent a repudiation of the proper role of consumer surveys in Lanham Act cases. The error in this case was Mead's: it commissioned consumer research that went far beyond the permissible inquiry into advertising communication and, instead, probed consumer views about the nature and quality of the advertiser's substantiation. The Seventh Circuit properly rejected this unprecedented use of consumer research.

REASONS FOR DENYING THE WRIT

There is nothing aberrational about the Seventh Circuit's decision. It is consistent with Lanham Act case law regarding claim substantiation and consumer surveys and it is consistent with advertising standards followed by the Federal Trade Commission.

I.

PRIOR TO THE DISTRICT COURT'S DECISION, NO COURT HAD EVER RELIED ON CONSUMER RESEARCH TO DETERMINE THE ADEQUACY OF AN ADVERTISER'S CLAIM SUBSTANTIATION

Abbott agrees with Mead that the "1st Choice of Doctors" claim is an "establishment claim." An "establishment claim" is a claim that represents that an objectively verifiable product attribute has been proven by medical, scientific or other evidence. In such cases, the truth or falsity of the claim is measured by whether the supporting evidence possessed by the advertiser is sufficient to

"establish" the claim in question. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1089 (7th Cir. 1994); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991).

In the leading case on establishment claims, *Procter & Gamble Co. v. Chesebrough-Pond's*, 747 F.2d 114, 119 (2d Cir. 1984), the Second Circuit held that, in judging the adequacy of the data offered as substantiation, the court must consider "all relevant circumstances" including:

(i) the state of the testing art;

(ii) the existence and feasibility of superior procedures;

(iii) the objectivity and skill of the persons conducting the tests;

(iv) the accuracy of their reports; and

(v) the results of other pertinent tests.

This inquiry does not, however, extend to the views of *consumers* regarding the adequacy of the data. To the contrary, the court must determine the adequacy of the substantiation based upon the testimony of scientists, statisticians and other experts. As the *Procter & Gamble* court explained (747 F.2d at 120):

> That a district court, sitting as trier of the facts, must consider, analyze and weigh expert testimony regarding clinical testing standards, procedures and results, has long been recognized.

In accordance with this principle, issues relating to claim substantiation are routinely decided on the basis of expert testimony, not consumer surveys. Such issues include:

1. ***Proof of Efficacy***: The degree of scientific proof that is necessary to show that a product is efficacious.[3]

2. ***Meaningful Superiority***: Whether a point of differentiation between two products is sufficiently meaningful that it can provide the basis for a superiority claim.[4]

3. ***Statistical Significance***: Whether measurable product differences are statistically significant, and therefore capable of supporting a comparative claim.[5]

4. ***Duration/Speed of Action***: Whether a drug can be said to start to work faster, or last longer, than a competing drug.[6]

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3. *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 203-5 (D.D.C. 1989), *aff'd in part and rev'd and vacated in part on other grounds*, 913 F.2d 958 (D.C. Cir. 1990) (health claim for a dog food); *Ciba-Geigy Corp. v. Thompson Medical Co.*, 672 F. Supp. 679 and Appendix I (S.D.N.Y. 1985 and 1984) (efficacy levels for diet drugs).

4. *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993) and *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57 (2d Cir. 1992) (whether differences in motor oil viscosity provide a meaningful performance advantage); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992) (whether difference in osmolality levels provides a meaningful benefit to infants).

5. *McNeil-P.P.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1546-48 (2d Cir. 1991); *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 167-68 (2d Cir. 1978).

6. *Ciba-Geigy Corp. v. Thompson Medical Co., supra* (duration claims for diet drugs); *Smithkline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson Merck Consumer Pharmaceuticals, Co.*, 1996 WL 280810 at *12 (S.D.N.Y. 1996) (onset of action for antacids).

The same rule holds true for establishment claims that are based on objectively verifiable market research. In such cases, whether the market research is adequate to substantiate the claim in question is determined by industry standards and by the testimony of experts in marketing, market research and statistics. For example:

5. ***The Proper Universe*****:** Whether the survey in question covered the appropriate "universe" of respondents.[7]

6. ***Tallying the Data*****:** Whether the advertiser has presented the survey results in a way that misrepresents the underlying data.[8]

7. ***Level of Statistical Significance*****:** What level of statistical confidence must be achieved in order to render a preference for one of the products significant.[9]

8. ***Accounting For "No Preference" Votes*****:** How to account for those respondents who have no preference for any of the products in the study.[10]

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7. *E.g.*, *Abbott Laboratories v. Gerber Products Co.*, 979 F. Supp. 569, 574 (W.D. Mich. 1997); *Church & Dwight Co. v. S.C. Johnson & Son, Inc.*, 873 F. Supp. 893, 907 (D.N.J. 1994); *McNeilab, Inc. v. American Home Products Corp.*, 675 F. Supp. 819, 823 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 34 (2d Cir. 1988).

8. *Philip Morris, Inc. v. Loew's Theatres, Inc.*, 511 F. Supp. 855, 857 (S.D.N.Y. 1980); *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F. Supp. 867, 872 (S.D.N.Y. 1980).

9. *Gillette Co. v. Norelco Consumer Products Co.*, 946 F. Supp. 115, 125, n.7 (D. Mass. 1996); *Avon Products Inc. v. S.C. Johnson & Son, Inc.*, 1994 WL 267836 at *5 (S.D.N.Y. 1994); *Abbott v. Gerber*, *supra*, 979 F. Supp. at 575, n.6.

10. *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 587-88 (S.D.N.Y. 1987).

9. *Doctor Recommendation Surveys*: In the two reported cases dealing specifically with doctor recommendation claims, the courts looked to the views of marketing and market research experts to determine whether the claims were adequately substantiated.[11]

Thus, while consumer research is relevant to determine the message conveyed by an ambiguous advertising claim, it is irrelevant to determine whether the claim is adequately substantiated. In this case, it was no more proper for Mead to ask consumers what percentage of doctors must prefer SIMILAC in order for the claim to be true than it would be to ask consumers such questions as:

- How many clinical studies an advertiser must have in order to demonstrate a drug's superiority over another brand; or

- What degree of statistical significance should be required in order to justify the use of comparative data; or

- Whether a consumer preference claim can be supported by a survey that includes consumers who do not use the products in question.

In other words, the question of what percentage of doctors must prefer the advertiser's product in order for a

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11. *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 587-88 (S.D.N.Y. 1987) ("70,000 doctors recommend ANACIN-3" upheld despite the fact that 70,000 doctors represented only 10% of all doctors in the country); *ALPO Petfoods, Inc. v. Ralston-Purina Co.*, 720 F. Supp. 194 (D.D.C. 1989) (ALPO preferred "2 to 1" over other leading brands found misleading based on flaws in the survey methodology).

doctor preference claim to be true is not an issue that may be put to a consumer vote. Yet that is precisely what the District Court allowed Mead to do. The Seventh Circuit wisely overruled this misuse of consumer research. As it stated in its initial opinion (MJ App. C at 14a):

> Never before has survey research been used to set the standard to which objectively verifiable claims must be held.

And as it added in its Opinion on reargument (MJ App. A at 5a):

> Our fundamental conclusion is that a producer cannot make a factual issue just by conducting surveys about how science is done (or, worse, about how surveys should be conducted).

This conclusion is correct and is in accordance with well-settled Lanham Act law.

II.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE ROLE OF CONSUMER RESEARCH

Consumer research can play an important role in false advertising litigation. Even though a statement is not literally false, in the context of the overall ad it may nevertheless convey a message that is misleading. In such cases, the implied message is frequently proven through the use of consumer research. *E.g.*, *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham*

Corp., 960 F.2d 294 (2d Cir. 1992); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2d Cir. 1981); *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 169 (2d Cir. 1978). In this case, for example, the District Court properly considered Mead's consumer survey in connection with Mead's contention that the "1st Choice of Doctors" claim communicates an implied message that SIMILAC is the first choice of doctors *because it provides superior clinical benefits to infants*. Despite Mead's survey, the District Court rejected this interpretation (MJ App. D at 49a).

The Seventh Circuit fully recognized the role of consumer surveys in false advertising cases. In fact, it considered Mead's survey in connection with its determination of the meaning of Abbott's claim. Thus it pointed out that the "opening set of questions" (*i.e.*, the "open-ended" communication questions) were perfectly appropriate but showed that the "1st Choice" claim communicates little more than that SIMILAC is a high quality product. As the court stated (MJ App. C at 14a):

> If consumers took away from "1st Choice of Doctors" the implication that Similac is a high-quality product, as the author of the survey concluded, then they were not deceived (this Mead Johnson concedes); we doubt that it is proper to draw more from this survey.

On the motion for reargument, the Court rejected Mead's contention that its opinion ignored the role of surveys in false advertising cases. As noted above (*see* pp. 10-11, *supra*), the court explained that consumer surveys are not a proper way to determine whether the advertiser's substantiation for an objectively verifiable claim is sufficient (MJ App. A at 5a-6a).

In truth, it is Mead, not the Seventh Circuit, that is misapplying the law regarding consumer research. Not only is Mead attempting to use consumer research for an improper purpose (to evaluate the advertiser's substantiation), it is also espousing a point of view that would make consumer research sacrosanct and would force the courts to give uncritical acceptance to a plaintiff's consumer research. Such a rule would be unwise and unprecedented.

Like other circuits, the Seventh Circuit has long recognized that consumer surveys are a tool to assist the court in determining the message communicated by vague or ambiguous advertising statements. Because surveys are merely a tool, they can be accepted, rejected, or partially accepted and partially rejected; there is simply no requirement that a court must give controlling weight to a particular question in a survey. Accordingly, the courts routinely reach conclusions about advertisements that are unsupported by, or inconsistent with, consumer research. For example:

1. ***Literally False Claims***: The courts recognize that an ad may be found to be literally false without regard to consumer research.[12] In some cases, appellate courts have even found advertising to be literally false despite the trial

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12. *Warner-Lambert Co. v. BreathAsure, Inc.*, 204 F.3d 87, 96 (3d Cir. 2000); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999); *Rhone-Poulenc Rorer Pharmaceuticals, Inc. v. Marion Merrell-Dow*, 93 F.3d 511, 516 (8th Cir. 1996); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 14-15 (7th Cir. 1992); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991).

court's *rejection* of survey research that purportedly proved the advertising's falsity.[13]

2. *Misleading Claims*: While a consumer survey is the most persuasive way to prove that a literally truthful claim conveys an overall message that is misleading, many courts have found that an advertisement is misleading even though no consumer survey was presented.[14]

3. *Literally Truthful Claims*: The courts have frequently found that a given claim is, in the context of the defendant's overall advertising, truthful. Such a finding can be made despite the presence of a survey purporting to show that the claim is false.[15]

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13. *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975 (2d Cir. 1988); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312 (2d Cir. 1982).

14. *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1337 (8th Cir. 1997); *William H. Morris Co. v. Group W Inc.*, 66 F.3d 255, 258-59 (9th Cir. 1995); *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 272 (2d Cir. 1987); *Better Business Bureau of Houston v. Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982); *see Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999).

15. *L&F Prods. v. Procter & Gamble Co.*, 45 F.3d 709 (2d Cir. 1995) (court disregarded plaintiff's survey); *Glaxo Warner-Lambert OTC G.P. v. Johnson & Johnson Merck Consumer Pharmaceuticals Co.*, 935 F. Supp. 327, 331 (S.D.N.Y. 1996) ("The Court finds that the premise of the consumer survey is faulty and does not support a finding that consumers were misled. Not only is the defendant's advertisement literally true; it is actually true."). *See United Indus. Corp. v. The Clorox Co.*, 140 F.3d 1175 (8th Cir. 1998); *Avis Rent A Car Systems v. The Hertz Corp.*, 782 F.2d 381 (2d Cir. 1986) (defendant had a survey).

4. ***Non-Misleading Claims***: Numerous courts have found that an advertisement is neither literally false nor misleading despite the presence of consumer research which purports to show that the ad is misleading.[16]

In short, while consumer surveys are useful tools in false advertising litigation, there is no rule that they must be given blind deference. That Mead's market research expert was able to solicit consumer views regarding the *number* of doctors who should prefer SIMILAC in order for Abbott's claim to be true is simply not dispositive. The Seventh Circuit's refusal to defer to this particular aspect of Mead's survey in no way departs from established Lanham Act case law.

III.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH FTC ADVERTISING STANDARDS

Mead's argument that the Seventh Circuit's decision is inconsistent with FTC precedent is wrong. The FTC has long enforced a simple bedrock rule: an advertiser must have a "reasonable basis" for its advertising claims. *In re Pfizer*, 81 F.T.C. 23, 62 (1972); *Porter & Dietsch, Inc. v. Federal Trade Commission*, 605 F.2d 294, 302 (7th Cir. 1979). In the case of establishment claims, including professional

16. *L&F Products v. Procter & Gamble Co.*, 45 F.3d 709 (2d Cir. 1995); *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms.*, 19 F.3d 125 (3d Cir. 1994); *Johnson & Johnson-Merck Consumer Products Co. v. Smithkline Beecham Corp.*, 960 F.2d 294 (2d Cir. 1992); *BellSouth Adver. & Publ'g Corp. v. Lambert Publ'g*, 45 F. Supp. 2d 1316, 1321-22 (S.D. Ala. 1999), *aff'd without op.*, 207 F.3d 663 (11th Cir. 2000).

endorsement claims for health care products, the question of whether the advertiser's data furnishes a "reasonable basis" for the claim is decided on the basis of expert testimony and other evidence regarding the quality of the substantiation in light of industry practice and standards.[17]

The two cases cited by Mead (Pet. 9-11) are merely examples of cases where the FTC, after reviewing the advertiser's substantiation for its professional endorsement claim, concluded that the data did not reasonably support the claim. Thus in *In re Gerber Prods. Co.*, 62 Fed. Reg. 13619 (1997), the Commission found that Gerber's "4 out of 5 pediatricians" claim was misleading because only 12% of the doctors in the survey recommended Gerber products. Similarly, in *In re Standard Brands, Inc.*, 97 F.T.C. 233 (1981), several professional endorsement claims for Fleischmann's Margarine were found to be misleading because the vast majority of doctors (67.5%) did not recommend any specific brand of margarine and, of those who did, 84.5% did not recommend Fleischmann's. In both cases the issue was the adequacy of the substantiation, not consumer opinion as to what the substantiation should be.

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17. *E.g.*, *In re Bristol-Myers Co.*, 102 F.T.C. 21, 321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *In re American Home Prods. Corp.*, 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681, 691-93 (3d Cir. 1982). In *In re Del Pharms., Inc.*, No. 972-3084 (F.T.C. 1998), the consent decree provided that Del's professional endorsement claim must be based upon "competent and reliable scientific evidence" consisting of:

> [T]ests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Mead's suggestion (Pet. 23) that the facts in *Gerber* are "almost identical" to the facts of this case is demonstrably untrue. In *Gerber*, the advertiser made a specific quantitative claim about the percentage of doctors who favored its product, *viz.*: "4 out of 5"; the claim was misleading because only 12% of all doctors in the survey recommended Gerber products. In contrast, Abbott makes *no* claim regarding the percentage of doctors who prefer SIMILAC, yet in twelve different surveys a minimum of 25% and a maximum of 64% preferred SIMILAC. Moreover, in contrast to Mead's contention, the FTC did not utilize consumer research to determine whether the number of doctors who recommended Gerber products was sufficient; like the Seventh Circuit, the FTC made that determination by examining Gerber's doctor surveys in light of Gerber's claim.

In sum, the decision below is clearly consistent with the FTC's advertising substantiation requirements. Given the uniformity of the preference for SIMILAC in the twelve doctor surveys, it is inconceivable that Abbott does not have a "reasonable basis" for its "1st Choice" claim under FTC law.

CONCLUSION

The Seventh Circuit's decision is consistent with Lanham Act case law regarding false advertising claims. The decision that was inconsistent with prevailing case law was that of the District Court, which would have turned questions of claim substantiation into issues for consumer determination on a case-by-case basis that would provide no guidance to advertisers, market research companies or their lawyers. The Seventh Circuit wisely rejected that approach. Its decision should not be disturbed.

Respectfully submitted,

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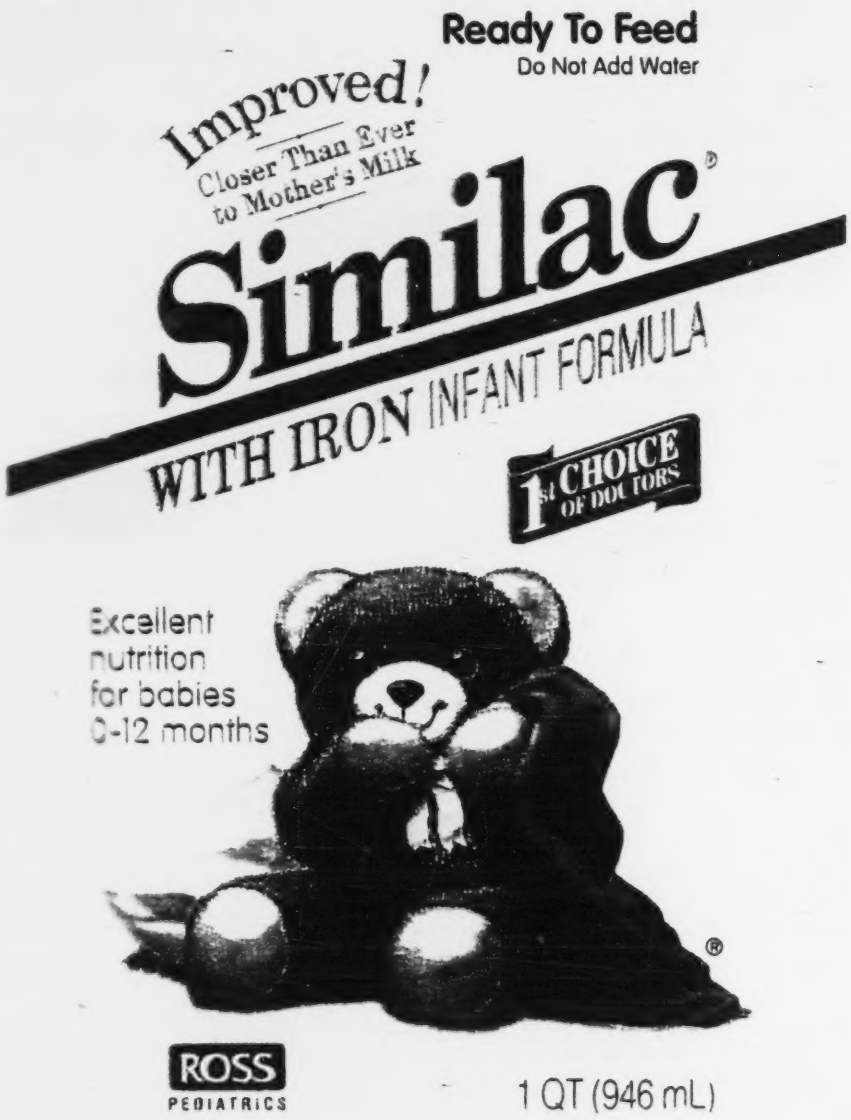
APPENDIX

APPENDIX A — SIMILAC PRODUCT LABEL



APPENDIX B — PROFESSIONAL ENDORSEMENT CLAIMS APPEARING IN RECENT NATIONAL ADVERTISING

1.	VICKS CHLORASEPTIC	"#1 Doctor Recommended."
2.	MONISTAT 3	"Of all the yeast infection treatments, doctors recommend MONISTAT most. MONISTAT, the number one doctor recommended brand."
3.	ZANTAC 75	"The medicine in ZANTAC 75 is the number one doctor prescribed acid reducer."
4.	TRIDENT Gum	"TRIDENT is the #1 Dentist Recommended Gum."
5.	CAPZASIN-P	"[T]he ingredient in CAPZASIN-P [is] the topical analgesic ingredient doctors recommend most for arthritis pain."
6.	CORRECTOL	"[C]ontains the ingredient recommended most by doctors for safe, dependable, overnight relief of irregularity."
7.	EXTRA-STRENGTH TYLENOL	"For headaches, doctors recommend TYLENOL the most."

Appendix B

8. CHILDREN'S TYLENOL	"The first choice of pediatricians."
9. DESITIN	"[T]he first choice of pediatricians for diaper rash."
10. LUBRIDERM	"Recommended by dermatologists more than any other leading brand."
11. URISTAT	"[T]he #1 doctor recommended brand for relieving urinary pain."
12. BABY ORAJEL	"[T]he teething brand pediatricians recommend #1."
13. TUMS	"Tums is recommended by more doctors than any other brand of calcium."
14. DOVE	"DOVE's the one that dermatologists recommend most."
15. BENADRYL	"[M]ore pediatricians recommend BENADRYL"
16. MOTRIN	"[T]he most prescribed name in the history of pain relief."

Appendix B

17. IMODIUM	"[T]he brand recommended most by doctors and pharmacists."
18. MYLANTA	"The #1 Doctor Recommended Liquid Antacid."
19. PREPARATION H	"[T]he most widely doctor-recommended OTC hemorrhoidal remedy."
20. ADVIL	"More doctors recommend ADVIL than any other brand for minor arthritis pain, backaches, menstrual cramps, and muscle aches."

Source: Lisa Davis AFF (Seventh Circuit JA 1118-1161).

APPENDIX C — RESPONSE TO Q-5 IN IVAN ROSS SURVEY

Response re Percentage of Doctors Required	Number of Respondents	Percentage of Respondents
100% all	24	8.2%
90% or more	73	24.9%
85%	8	2.7%
80%	30	10.2%
75%	40	13.7%
70%	12	4.1%
60%	21	7.2%
55%	1	.3%
51%/more than 50%	35	11.9%
Majority (without percentage stated)	1	.3%
50%/at least half	23	7.8%
Less than half	4	1.4%
No opinion/DK	17	5.8%
Non-responsive	1	.3%
Did not understand	1	.3%
Total	**293**	**100%**

***Source*: Individual Responses from Ivan Ross Consumer Survey (Trial Exh. 1).**

(3)

Supreme Court, U.S.
FILED
AUG 22 2000
CLERK

No. 00-71

IN THE

Supreme Court of the United States

MEAD JOHNSON & CO.,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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The perception of consumers is the *sine qua non* for determining what message is implied by an advertising claim. It is this fundamental and seemingly straightforward principle that the Seventh Circuit in this case has upended. Abbott, in its Brief in Opposition to Mead Johnson's Petition, attempts to obscure that simple point, ignoring the plain language of the appellate court's decision and contending that, instead, what this case is about is *how* the claim must be substantiated, a question that Abbott rightly notes is the provence of experts, not of consumers. Yet, whether the claim "1st Choice of Doctors" for Abbott's infant formula Similac says anything about the number or percentage of doctors who choose Similac first is not a technical question concerning how a survey must be conducted. What that phrase — which "ingeniously"[1] leaves open the question of quantity by failing to specify "some," or "most," or "all" — communicates must be determined by those for whom the message is intended. Despite Abbott's contentions, this is what the uniform caselaw *and* the practice of the Federal Trade Commission ("FTC") mandate, and what the Seventh Circuit now has rejected.

To accept Abbott's argument is to ignore the broad language of the Seventh Circuit's decision, which rejected as legal error any reliance on "the first impressions of people on the street," ignored the fundamental ambiguity of the claim "1st Choice of Doctors," and held that, where a claim is, in the court's view, "objectively verifiable," consumer understanding of the claim's meaning has no place.

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1. App. D at 26a.

THE COURT'S RULING IS FAR BROADER THAN ABBOTT SUGGESTS.

Ignoring the key finding by the district court judge that the claim "1st Choice of Doctors" is "deeply — and almost ingeniously — ambiguous" (App. D at 26a), Abbott contends that the consumer perception survey was used essentially to determine what level of substantiation for that claim was necessary — an issue that Abbott characterizes as a "how" question, as in "how" the claim must be substantiated. This question, it argues, belongs with research experts, not consumers. The appellate decision, Abbott argues, simply rejected this use of consumer research as inappropriate.

But the Seventh Circuit decision, and Abbott's opposition to the Petition, ignore a fundamental ambiguity in the "1st Choice of Doctors" claim. Abbott's advertising claim is silent on how many doctors consider Similac their first choice. The generic reference to "Doctors," with no quantitative qualification, reasonably can be understood to be a reference to all or most doctors. Indeed, Abbott's previous claim on the same product had been "1st Choice of More Doctors." By deleting the quantitative modifier, and by using the claim in the context of advertising copy that referred to the expertise of "doctors" generally (App. D at 35a), Abbott created an ambiguity regarding the extent of doctor preference for its formula. Is Similac the first choice of most doctors? of all doctors? of any number of doctors? of a plurality of doctors?

The question explored by the consumer survey was not "how" but "what"? What message was being conveyed to consumers through the use of the unqualified and ambiguous phrase "1st Choice of Doctors?" It is to answer that question that the survey was conducted.[2]

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2. Aside from its criticism of the consumer survey, Abbott's characterization of the results of the *doctor* studies in evidence before

(Cont'd)

Despite Abbott's efforts to narrow the scope of the appellate court's decision in the hope of defeating this petition, the breadth of the language used by Judge Easterbrook speaks for itself. The Seventh Circuit ruled unambiguously that consumer survey evidence — "the first impressions of people on the street" — is legally irrelevant to "determine the meaning of words, or to set the standard to which objectively verifiable claims must be held" in the context of a charge that advertising is false or misleading. (App. C at 14a.) Rather than rely on consumer surveys to determine the meaning of objectively verifiable words, the court said, the more appropriate approach is to rely on dictionaries and lexicographers. "It would be a bad idea to replace the work of these professionals with the first impressions of people on the street, especially because consumers' sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification." (App. C at 15a.) Thus, the appellate court clearly ruled that an advertiser's obligation to substantiate its claim should not depend on the perceptions of consumers regarding the meaning the claim conveys. That ruling stands in stark contrast to the rulings of 20 years of Lanham Act jurisprudence that the perceptions of consumers are relevant to determining what implied claims are conveyed in advertising.

(Cont'd)
the district court, Opp. Brief at 4-7, was flawed and incomplete. As the district court painstakingly explained, most of the physician surveys purporting to show a majority preference for Similac calculated that percentage by ignoring those respondents who stated that they had no preference. In other words, the "majority" reflected in Abbott's recitations frequently represented a majority of that subset who professed a preference, not of all doctors surveyed. Other surveys were rejected for a number of procedural or structural deficiencies. (*See* App. D at 50a-80a.) In any event, the proper understanding of the physician surveys' results presented questions of fact for the district court that are not directly implicated in the disposition of this Petition.

ABBOTT MISUNDERSTANDS THE FEDERAL TRADE COMMISSION'S APPROACH IN THIS AREA.

The standard articulated by the courts in the context of the Lanham Act dovetails precisely with that embraced by the FTC in dealing with deceptive advertising. That agency, like the courts, applies the yardstick of consumer perception to determining whether a claim is misleading. The difference between the courts and the agency is not the standard by which a claim is measured, but the appropriate burdens of proof used to reach a conclusion. Unlike the courts, which lack specialized expertise in this area and therefore generally depend on results of actual consumer research to inform their decisions, the FTC itself is expert in understanding consumers' reactions to claims and, thus, can "stand in the shoes" of those consumers for the purposes of its decision-making. In both the *Gerber Products* and *Standard Brands* proceedings (*see* Petition at 23-24), the agency surmised how it believed consumers would understand the doctor endorsement claims in question, on that basis concluding that they were misleading and had to be discontinued.

CONCLUSION

The uniform standard utilized by all decisors in evaluating advertising has rested on the touchstone of consumer perception. Simply put, a claim means what a "not insubstantial" number of consumers say it means[3] — and with good reason. Advertisers, with few exceptions, don't intend their messages for lexicographers or judges. They intend them to be understood and responded to by consumers. Thus, how those consumers interpret the messages is of paramount importance. The Seventh Circuit's mystifying

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3. *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) and cases collected at App. D, 42a n.4.

disregard for that fact contravenes what up until now has been an overwhelming consensus among courts and the one federal agency tasked with policing deceptive advertising. Mead Johnson respectfully urges that grant of its Petition is necessary to restore nationwide uniformity and the ability of the Lanham Act to effectuate the purposes for which it was enacted.

Respectfully submitted,

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